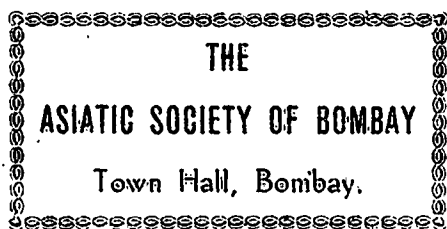


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ENGLISH LAW

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IRISH TENURE.

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BY

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LONDON:

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ENGLISH LAW AND IRISH TENURE.

No one can hope, at the present stage of the discussion, to write anything really new about the Tenure of land in Ireland. The utmost to which a writer can aspire is to group the facts and information accessible to every one in fresh combinations, and to place the results of the accumulated evidence in some new light. This is all I aspire to. I have been much struck by a remark made to me by more than one Irish landlord, in reference to some of the schemes which have been lately proposed :—" We hold," they said, " our lands " by grant or purchase under English law, and we " claim that the remedies adopted for Ireland should " be in accordance with English law." Every one must feel the force of the remark, and must wish the remedies offered by English law to be exhausted before going beyond it. English law is not, and never was, a system merely of inflexible rules in regard to tenure. In feudal times, the age of its strictest rules, those rules were modified by manorial customs, of which our early law books have handed down many examples ; and even in that age custom converted the tenure of villenage into copyhold. In later times, equity and customs of the country have come in, and English law has scanned, with ever increasing sensitiveness, the relations which the parties have themselves created.

My object is to place the facts of Irish tenure by the side of the principles of English law, and the decisions of our Courts most nearly applicable, and to see what help these principles and decisions afford us towards dealing with the past and legislating for the future.

We shall find, probably, that our conclusions must take the form of suggestions rather than of positive enunciations of law, for the relations of the parties in the case before us are embrangled, and the dealings of the landlords of Ireland with their tenants have resulted, if I mistake not, in a very complicated state of accounts. The facts besides of Irish tenure are varied, and not unfrequently assertions regarding it made by one are contradicted by another; and on scarcely any point are the facts so distinct as to allow of a general statement being made without the introduction of large exceptions. I have therefore stated nothing of importance except on the evidence of witnesses speaking under responsibility, and I have constantly preferred, at the risk of being tedious to readers not deeply interested in the subject, to let those witnesses speak in their own words, that my readers may be able for themselves to gauge their credibility. Still, I venture to hope that the investigations contained in these pages may prove neither useless nor uninteresting.

There is one point in which all who examine any Irish question agree, that it is impossible to understand the present without some reference to the past. To the past, therefore, we must look, yet only so far

as the past is distinctly connected with or illustrates the present, and without allowing ourselves to be led astray by mere antiquarian research.

The course of our investigations takes us to the epoch, as our starting point, when English law was effectually introduced into Ireland. That epoch was the reign of James the First. The earlier condition of Irish tenure is best explained by the changes then made. The two centuries and a-half since that epoch fall of themselves into five periods: the period from 1603 to the rebellion of 1641, distinguished by the settlement of Ulster; the period from 1641 to the accession of Queen Anne in 1702, during which the Cromwellian settlement was made, and the settlement of William the Third was begun; the period from 1702 to 1782, the age of the Penal Laws relating to tenure; the period from 1782 to the Famine of 1846; and, lastly, the period from the famine to the present hour. Each of these periods has contributed its share to the present state of tenure; but none as it appears to me, a more important share than the period from 1782 to 1846. On the preceding periods, therefore, we will dwell as lightly as possible.

I. James the First began his reign with the fixed intention of carrying out, in the words of an Irish Statute, the "happy uniting of the Kingdoms of England, Scotland, and Ireland, under one Imperial Crown."* With this view, he determined to introduce

* 11, 12, and 13 Jac. I c. 6.

English law over the whole of Ireland. Before his time English law had been of force only over the counties of Louth, Dublin, Meath, and Kildare, the counties within the Pale, and over some of the Eastern seaports. Beyond these limits the authority it had once asserted had fallen into decay throughout nearly the whole of Ireland, and the native or Brehon law had been recognized as the law of the mere Irish. Hence, when English law was introduced, the relations between English law and Brehon law necessarily came before the King's Courts and the King's government in Ireland. Was English law to exclude Brehon law, or to admit it as a particular custom? There can be no doubt that the Judges felt the importance of this question, for they discussed it with great solemnity. Two well-known cases, reported by Sir John Davies, the Irish Attorney-General of that day, called "The case of Tanistry" and "The Irish Custom of Gavelkind," and some tracts written by him, contain the decision of the Judges, and afford us our chief information on the whole subject. We are told by him that the lands possessed by the Irish were divided into territories, each under a chieftain; and that the inhabitants of the territories were divided into septs, each under its chief. The "chiefry" of the chieftain of a territory, and of the chief of a sept ran in course of Tanistry; the possession of the inhabitants ran in course of Gavelkind. By the custom of Tanistry, the chiefry with the portion of land annexed to it went, on the death of the chief, to the oldest and worthiest of his blood

and surname, who was called the Tanist. By the custom of Gavelkind, the lands of each inhabitant on his death were subject, at the will of the chief, to partition among all the males of the sept. On the death of any one holding a considerable portion, the chief assembled the sept, and having thrown all the shares into hotch-pot, made a new partition; not assigning to the son of the deceased his father's portion, but allotting to all the members of the sept portions according to seniority. The system, Davies adds, caused frequent partitions, the removal of tenants from one part to another, and uncertainty of possession; no civil habitations were erected, no enclosures or improvements were made; and Ulster, especially, before the plantation of the English Undertakers, seemed all one wilderness. The custom, he notices, had three other points repugnant to the Common Law of England; bastards succeeded as well as legitimate children; wives of tenants were not entitled to dower; and daughters did not succeed in default of male heirs.

The custom of Tanistry was brought before the Judges in a claim for a castle in the county of Cork, and its merits were carefully argued; and though we may smile at some of the reasons which had great weight with them as feudal lawyers, it is impossible not to agree in their judgment that the custom was open to great objection, and was the cause of great effusion of blood and of many other mischiefs. The custom of Gavelkind was brought before them as

matter of policy for their advice. They compared it with two precedents with which they were acquainted—the gavelkind of Kent and the gavelkind of Wales. It differed from the gavelkind of Kent, a custom long recognized in English law ; but in the three points last noticed, it resembled the gavelkind of Wales. Now the history of Welsh tenure is remarkable. When Edward the First incorporated Wales with England, he caused the laws and customs used in Wales to be rehearsed in the presence of his Council, and some he abolished and some he allowed, and others he reformed.* Among the last was Welsh gavelkind, which he stripped of the three peculiarities which the judges found in Irish gavelkind ; and, thus reformed, the custom existed till it was put an end to by a Statute of Henry the Eighth.† This Statute helped to guide the judges. They resolved that the custom was void, and that the inhabitants of the Irish territories were to be governed thenceforward by the rules of the Common law.

The Report of Sir John Davies leaves much in the ancient tenure unexplained. The partition of land by the chief among the sept, implies that the land was the common property of the sept ; while the three points in which the Irish custom resembled Welsh gavelkind, indicate that rights of succession existed, and that, to some extent or over some land, tribal property had given way to separate property in individuals or in families. Davies does not explain this apparent contradiction. The Judges when comparing Irish gavel-

* 12 Ed. I., stat. Walliæ. † 34 Hen. VIII., c. 26, s. 91.

kind with Welsh gavelkind evidently derived their knowledge of Welsh tenure solely from the Statute of Edward, for they refer to nothing else. Following out the comparison begun by them, and consulting for ourselves the ancient Laws of Wales, we find a law which may perhaps supply an explanation. There was in Wales hereditary land, and land which was not hereditary. The hereditary land went in the family, but the land which was not hereditary was divided by the King's officers among all the inhabitants of the townland. This division is so like the partition made by the Irish chief, as to render it probable that the account given by Davies is incomplete. His further statement that the partition was at the will of the Irish chief is too improbable to be accepted without hesitation. We shall not, however, gain by pursuing the subject. Amidst its difficulties, one thing appears clear even from this Report, and the additional knowledge acquired by modern investigation places the point beyond a doubt, that the Judges had not thoroughly mastered Irish gavelkind.*

The Resolution of the Judges was declared to be law, but for the protection of the Irish a provision was added confirming in their possession all who had enjoyed any portion of land by Irish gavelkind before the beginning of the king's reign. Thus Irish customs were abolished, and the legislators of James

* Davies' Reports, 78, 134, Eng. Translation. Hallam's Const. Hist. III. 459. Ancient Laws and Institutes of Wales, p. 82. Ancient Laws of Ireland, II. Preface, p. xlvii.

the First broke wholly with the past. Within a year or two of the date of this Resolution, the greatest English lawyer of the age, Chief Justice Coke, described English law as divided into Common law, Statute law, and Customs of England. English law was introduced into Ireland without the element of custom. It could not carry thither the customs of England. It rejected all the customs of Ireland. At the very beginning, therefore, there was a difference between English law as administered in England and as administered in Ireland.

In England since that day the domain of Custom has been progressively enlarged, and Custom itself has undergone a change. The language of the old law is that Custom has the force of law. This was true of manorial customs, for they were in fact local laws. But the language does not accurately describe the obligation of a modern "custom of the country." That is a term expressed or implied in the agreement of two parties contracting in that country or district with reference to the subject-matter of the custom. As tenure has passed from tenure by *status*, the tenure of the old manors, to tenure by contract, so customs have passed from being incidents of tenure by *status* to being terms of a contract. This transition has been accompanied by one remarkable difference. The ancient customs required for their establishment use continued time out of mind, while modern customs of the country become established whenever they can be presumed to be generally admitted. Practically agricultu-

rists consider an usage to become generally known in a district in about twenty years. Hence Custom has acquired the flexibility of contract, and there is, perhaps, no relation of life which it has done so much to regulate as the relation of landlord and tenant. "The common law," Lord Wensleydale said, in a judgment delivered in 1836, of great weight among lawyers, "does so little to prescribe the relative duties of landlord and tenant, since it leaves the latter at liberty to pursue any course of management he pleases, provided he is not guilty of waste, that it is by no means surprising that the court should have been favourably inclined to the introduction of those regulations in the mode of cultivation which custom and usage have established in each district to be most beneficial to the parties."* Custom has thus restrained the tenant's liberty, and in turn it has given him protection. That protection has been at all times, and especially in recent times, a marked effect of custom. Thus in England, though permanent improvements are seldom made by a tenant, yet in districts where a practice of husbandry has grown up requiring expenditure for which he cannot reimburse himself during the tenancy, side by side a right of remuneration, called tenant-right, has also grown up, beneath the shelter of the "custom of the country."

In 1847 a Committee of the House of Commons was appointed to inquire into the agricultural customs of England and Wales; and their Report contains so

* *Hutton v. Warren*, 1 M. and W., 474.

much that is closely connected with our subject as to justify our digressing to study it. They reported that in addition to usages of long standing with the name of tenant-right, under which an outgoing tenant was allowed compensation for various ordinary operations of husbandry, when precluded from receiving a due return by the termination of his tenancy, a modern usage had sprung up, extending the principle to improvements of the soil—such as draining, chalking, and marling,—which required longer time to elapse before the increased productiveness obtained by them could reimburse the expenditure incurred. This modern usage, they said, had gradually grown into acceptance in many districts, till it had become recognized there as the custom of the country, and was finding its way into new districts. The amount of the compensation was settled by ascertaining the cost of the several improvements, and then spreading it over the number of years within which each kind of improvement was supposed to repay itself, and deducting from the number the time during which the tenant had enjoyed the benefit of the improvements. The Committee traced this modern usage to the introduction of spirited systems of farming, and attributed its successful growth to the co-operation of landlords and tenants, who had entered into agreements by which the landlord promised to give compensation for the tenant's outlay, and had enlarged their agreements with the advance of agriculture.

One instance from the evidence will exhibit a custom

in the process of growth, and will serve later for the purpose of comparison. A gentleman of Lincolnshire, who had managed his own property for upwards of fifty years, stated that it was now an established custom in Lincolnshire for outgoing tenants to receive a proportion of their outlay upon artificial manures, underdraining, and some other operations, calculated with a reference to the number of years they had enjoyed the land. He remembered, he said, the origin of the custom. In his younger days farming in Lincolnshire was very backward, and one-third of the country was wretchedly cultivated. The introduction of the four-course system, of the use of artificial manure, and of underdraining, brought improvements; and with the improvements grew up this custom. After a lapse of years, some valuers began to make allowances to tenants quitting their farms, for their outlay towards these improvements. But the arrangement was very gradual in its progress. At first it was stoutly opposed by other valuers and by incoming tenants, as an innovation; but by degrees it won its way "from the wisdom," he said, "and justice of the measure, for the more it was investigated, the more it was found to be just." He was asked if the custom was the consequence or the cause of the improved cultivation. It was the consequence, he answered; but as it insured the tenant compensation on quitting, it had, in turn, stimulated improvement.

A case decided by the Court of Queen's Bench, in

1851 shows us one of these customs in the Courts of law.

A yearly tenant of a farm in Derbyshire held his farm upon the terms of his cultivating the land according to the rules of good husbandry, and the custom of the country. The tenancy was determined by the landlord, and upon its determination, he claimed from the landlord, under the custom of the country, a proportional part of the cost of drainage done during the preceding two years, but done without the knowledge or assent of the landlord. There was no dispute as to the propriety of the drainage, but the existence of the custom was disputed, and conflicting evidence was brought forward. The jury found that the custom existed as alleged by the tenant. It was then argued that the custom was unreasonable; and this point was reserved for the judgment of the Court of Queen's Bench. The Court held the custom to be reasonable. One of the judges, Mr. Justice Erle, remarked that it would not be an unreasonable contract between landlord and tenant that the tenant should be at liberty to put in such drainage as was necessary, and that the landlord should pay a portion of the expense; and if it was not unreasonable as a contract, it was not unreasonable as a custom.*

In 1845, the late Lord Derby brought a Bill into the House of Lords for giving compensation for improvements made by tenants in Ireland. In a speech

* *Mousley v. Ludlam*, 21, L.J., N.S. 64.

of great eloquence, he said that the most important because the most effectual means of improvement in Ireland was by encouraging the occupying tenant to invest his labour and his capital in the land : but it was an object to which the Legislature had not hitherto devoted its attention. He calculated the capital hoarded by the tenants. It could be called forth, he said, only by giving the tenant security that, if it were expended on the land, he should not be removed without fair compensation for the improvements it had effected. In England that security was given by the custom of the country, which had the force of law ; and compensation was awarded for improvements made not with the express consent of the landlord, but without leave asked for a single one of them. In Ireland, he said, there was no such custom : and he urged the House to apply the principle to Ireland by law, which was recognized in England by custom.*

This absence of custom following and adapting itself to the actual relations of landlord and tenant cannot fail, I think, to be the first point which strikes an English lawyer in considering Irish tenure. Knowing that large districts in England are held under a tenure from year to year, and that where improvements of the slightest durability are made by tenants, their outlay is reimbursed under some custom of the country,—when he comes to Ireland and is told that nearly the whole of the island is held under the same tenure, and that as a rule the permanent improvements are, or at

* Hansard's Parl. Debates, 1845, June 9.

any rate till recently were, made almost wholly by tenants, an English lawyer looks at once for a custom of the country to regulate the arrangement. But he finds none. Even Ulster tenant-right, which does provide for the arrangement, is not a custom acknowledged in law, but a course of dealing resting upon opinion. As it was in the days of Sir John Davies, so has it been all along, and so is it now. The relation of landlord and tenant in Ireland has been governed by English law, leaving out the element which in England forms the chief protection of the tenant.

The question naturally arises, and has frequently been asked of late years, as a question the answer to which ought not to be overlooked in legislation--What traces did Brehon law, though abolished by the Judges and the Lord Deputy, Sir Arthur Chichester, leave in the habits and sentiments of the people, and can any of those traces be observed at the present day? Of the custom of Tanistry we hear no more; but the custom of gavelkind long survived, reappearing, under English law, in a form of tenancy common down to the early part of this century; and it may still be traced in the love of holding property in families, in the tendency to subdivide the land, and in an unfavourable shape, in Rundale, where the tenement is made up of a number of scattered patches of each particular quality of the land. Probably the subdivision of the land in the early part of this century would have occurred under any tenure, for there was enough in the circumstances of the time to explain it without

recurring to traditional sentiment. Subdivision is the inevitable policy of a society thrown back upon the land as its sole resource. But the necessity for subdivision received no check, and was, on the contrary, fostered by Irish sentiment.

On the remains of Brehon gavelkind, we have evidence given before the Committee of the House of Lords, in 1825, by Mr. Leslie Foster, the Member for Louth, valuable as coming from a man of observation, and before the recent speculations on the political significance of national traditions :—

“The north of Ireland, that portion of the island which was settled by James the First, and in which he in fact destroyed what may be called the original fabric of Irish society, is very little open to the observations applicable to other parts of Ireland which did not undergo that change. In these other parts, the ancient habits of the Irish have to a great degree continued to this day; and though the English laws have been introduced among them, yet many of their own ancient laws still continue to exist in the shape of habits; their dispositions and their practice are in a state of complete contrast with the theory of the law as it regards the tenure of land.”

Mr. Foster followed out the subject in his answer to a question as to the effects of an Act passed in 1816, giving the Civil Bill Court jurisdiction in ejectment in the case of small tenements, and thus rendering the process more easy :—

“The act referred to by your Lordship was, I conceive, one of the most important in its consequences to the landed interest of Ireland, which has ever been passed in that country. Its primary object was to enable the landlord to have a remedy against his tenant, by a cheap and expeditious process, and thereby to lead to

the abolition of the tenancy in common, which was one of the greatest sources of the misery of the occupying tenantry of Ireland. Antecedently to the passing of that Act, there was a bounty given by the law to the landlord, to unite his tenants into clusters rather than to deal with them individually. The practice was to lease a certain tract of land to a company of persons, who all held it in common, no individual having any separate property in it whatever; very often there was added to that, the inconvenience of the tenancy being from year to year or at will. In either state of things, but more particularly when those two circumstances conspired, there was no incentive to industry. This habit, I apprehend, originated in the Irish laws antecedent to the English taking possession of the island. By the old Brehon laws, it was the usage of the people to hold tracts of the country by clans, and as tenants in common, and at the will of their immediate chief; and in those times succession was by the law of gavelkind. These habits I conceive to have continued to subsist in Ireland more or less perfectly in those parts which were not the subject of the plantation of James the First, or other English sovereigns, until the present day. I conceive that the state of the law antecedent to the statute to which your lordship has referred operated as a bounty upon the landlord to acquiesce in that state of things. He found it more convenient to allow those companies to continue to possess the land in that manner, because he could then, through the process of an ejectment, deal with any number that might be united in one company; whereas, if he leased to each person to hold in severalty, he would be obliged to bring as many ejectments as he had tenants. The first object, then, of the statute referred to was to enable the landlord, at the expence of a few pounds, and in the course of a few weeks, to get possession of his land from the occupying tenants in case of their withholding rents, provided the farm did not exceed a certain magnitude—fifty pounds a year. I conceive it has been the first and most important consequence of that statute to break up the tenancies in common very much. I know that the landlords in the south have already gone a great

way towards putting an end to that species of tenure, which has in my view, been one of the greatest sources of the misery of the tenantry."

There is an account of this form of holding in a Report written by Sir Henry Piers in 1682 on the county of Westmeath, a county, probably from its adjoining the Pale, always noted for adherence to Irish usages.*

Speaking of the husbandmen, he says:—

"I will crave the reader's patience to suffer me a while to give an instance of the dealing of this sort of men, and their customs in the manage of their husbandry one with another. Every town-land held by them is grazed in common; that is, every man's stock goes indifferently over all the pastures of the town. The difference lies here: he who holds the greatest number of acres in the arable is supposed the more able farmer, and consequently is allowed to have more cattle in the pastures of the town than he who holds fewer acres, or a lesser holding, as they call it. The great evil hereof generally is overstocking their ground, by means whereof it is too often seen, once in three or four years, that they hazard the loss of their stock. As they graze in common, so one who is not acquainted with them would think that they plough in common too. For it is usual with them to have ten or twelve ploughs at once going in one small field; nevertheless everyone here hath tillage distinct, though all appear fenced up in one mear or ditch. They divide usually one field into acres, half-acres, stangs—that is, roods; and of these they make so many lots or equal shares, as there are ploughs in the town, so as a man whose share may amount to three acres shall not have, perhaps, half an acre together, but scattered up and down in all quarters of the field."

Sir Henry Piers is not a friendly witness, and he narrates with some humour the care each man took

* Hallam's Const. History, iii. 485.

lest he should be overreached by his neighbour ; the casting of lots for the shares, the discontent, the wrangling, a new division, and the restoration of peace by the interference of the landlords. Their customs, he tells us, obliged them to aid one another in ploughing. If they disagreed, the husbandman seeking aid appealed to the landlord, who was considered bound to provide a helper, and if this helper made default, himself to help. The husbandman then brought his own cart and tackle day by day into the field, and offered them with his own labour and a proportion of seed to the defaulting helper, and at the harvest became entitled to a share of his crop. The custom, he adds, was called the law of Owen with the Beard, an ancient Brehon.

The landlords, in the picture drawn by Piers, retain many of the characteristics of chiefs. They protected their tenants against the oppression of others, in many cases from the payment of their just debts, and in turn, many still were, as had been the landlords of old, oppressors of their followers and tenants, and much given to cosher, that is, to come and live on them. They were appealed to in every dispute ; and so necessary were they that there was a saying that a town without a landlord and a bull, was a town turned topsy-turvy.

The following passage describes the tenure :—

“ They hold but from year to year, nor do they desire longer term. They have a custom on a stated day every year to come and give warning to their landlord to provide other tenants for their holdings and houses, and this they will do as formally as if

they were in earnest, and yet after all they intend nothing less, for they will not leave the place with their good will, where they and their ancestors have sat. In this case you shall have some of them tell their landlord, that they and their forefathers have been there as long, and perhaps longer, than he, and they will not out for him; whither shall they go? and the like stuff; and this their shyness of leaving their ancient habitation, is not without some cause. For if one of them remove but to dwell in the next county, nay, the next parish, provided it be under another landlord, he is on every little picque with his neighbour, reproached with terms importing vagabond, or a forsaken outcast, etc., and so keen is his *anima redeundi*, that he is not at ease within himself, till he make way for his return again, to the place, as he phrases it, where he ought to be—

Nescio quâ natale solum dulcedine cunctos
Tangit, et immemores non sinit esse sui.”*

In the next century Arthur Young found agricultural partnerships resembling this holding of Westmeath, in Kilkenny, on the mountain sides of Wicklow, as well as in other places. Of Kilkenny he says:—

“They have a practice here which much deserves attention: three, four, five, seven, &c., little farmers will take a large farm in partnership. They must be equal in horses, cows, and sheep, and tolerably so in other circumstances; they divide every field among themselves equally, and do all the labour of it upon their separate account, assisting each other mutually: they never throw the whole into one stock and divide the profit, from suspicions, I suppose, they have of one another.”†

In 1811, Mr. Edward Wakefield, saw large tracts in Sligo and Tyrone, held undivided in partnership; and as late as 1844, one of the witnesses before the Devon Commission, the Rev. Father Lyon, described

* Vallancey *Colloctanea de Rebus Hibernicis*, I. 115. 120.

† A. Young's *Tour*. Vol. i. 99; 8vo. 1780.

this form of holding as still existing on his own property in the remote district of Erris in Mayo, in words almost identical with the words of Sir Henry Piers. Four men of the village, he says, called Heads of Quarters, obtained the lease of a farm consisting of arable and grazing land, and then took in a number of others as co-partners. The farm was valued according to the number of cows for which there was grazing ground, the grazing of a cow being called a collop. Each partner paid rent in proportion to the number of collops he held ; but their cattle fed in common. The arable land was divided into as many portions as there were collops, and each had as many portions as he held collops. The land was redivided every two years, and in such a manner that if it consisted of various qualities, good, middling, and bad, each copartner had a ridge of good, of middling, and of bad, in different parts of the field. The Four adjusted the collops, and the shares of arable land among the other partners ; they collected the rents, and paid the landlord.

Such is the evidence as to the influence of Brehon Gavelkind upon later Irish life and character. I have set out the evidence at some length, and at the risk of repetition, because the only mode of estimating the influence of an early custom upon subsequent generations, is to trace the custom by historical evidence from generation to generation, to observe how far it becomes disintegrated by the action of new forces, and to note the time when the fragments can be traced only in popular sentiments. Two questions of statesmanship may then arise—How far these fragments will resist

further disintegration, and How far do they offer elements fitted for new combinations? To readers who care to answer these questions for themselves, the testimony of the witnesses, and not the generalizations of the writer, are of value.

The two other events of the period are the completion of the settlement of the forfeited lands of the Earl of Desmond in Munster, and the settlement of Ulster. These events have been so often narrated that we may confine ourselves to the observations they suggest. A few years before, in 1598, Edmund Spenser, in his *View of the State of Ireland*, wrote this remarkable passage :—

“There is one general inconvenience which reigneth almost throughout Ireland, that is, the lords of land and freeholders do not there use to set out the land in farm or for term of years to their tenants, but only from year to year: and some during pleasure: neither indeed will the Irish tenant or husbandman otherwise take his land than so long as he list himself.”

Sir John Davies also says that the uncertainty of estates was the true cause of that desolation and barbarism in Ireland, to which the like had never been seen in any Christian country. These passages leave no doubt that the statesmen of that day considered this uncertainty of tenure, tenure at will, or tenure in villenage, for by all these names, borrowed from their own vocabulary, they described it, as the great evil of the Irish system of septs; and to its cure their legislation was directed.

In the settlement of Munster the Undertakers were required to plant a specified number of English free-

holders and leaseholders on their grants; and in the settlement of Ulster the Undertakers, whether British, who were allowed to take none but British tenants; or servitors, that is, persons who had served in civil and military offices in Ireland, and who were allowed to take Irish as well as British tenants; or Irish freeholders, were all required to grant estates of certain tenure, and not to take Irish exactions. Both in Munster and in Ulster the British grantees were allowed to create manors and to hold Courts Baron,—another method of bringing about certainty of tenure and of introducing customs. At a muster in 1622 of the tenantry on the estate of the first Earl of Cork in Waterford, there were present freeholders, leaseholders, and thirty copyholders.* But this estate appears to have been an exception. Few manors were created, and very few, if any, survived the rebellion of 1641. This method totally failed. The settlement of Munster did not produce certainty of tenure, for a considerable portion of the forfeited lands was restored to the old proprietors, and most of the new grantees neglected to bring over English tenants in accordance with the terms of their grants, and became landlords of native tenants; and thus things went on in the old groove. The settlement of Ulster was more successful, and was dotted in centres through the counties of Armagh, Cavan, Fermanagh, Londonderry, Donegal, and Tyrone. About nineteen hundred English and Scotch freeholders and leaseholders were reported in the survey made in 1618, as planted in these counties.

* Smith's History of Waterford, 1774, pp. 33, 56.

James broke up the old fabric ; but we must not, I think, attribute too much to this particular scheme in the reconstruction of society in Ulster. The scheme affected at the highest estimate only five hundred thousand out of the two million eight hundred thousand acres confiscated, and was in some respects imperfectly carried out. Irish tenants were retained contrary to the terms of grant ; the English tenants were disinclined to cultivate from the unsettled state of the country, and lived upon the rents paid them by the Irish ; and the Scotch alone were diligent. Nor did the scheme affect Antrim and Down, the latter the most Scotch of Irish counties. Hence the construction of society in Ulster must be considered due in a more general way, to the immigration of Scotch settlers.*

It is startling to find the uncertainty of tenure which the statesmen of that day endeavoured to remedy, confronting us under different personal circumstances, as the complaint of the present time. Their difficulty is our difficulty—how to adapt the law which has grown up with English society to Irish society. The solution they proposed, which took no heed of the conditions of the native society, has not survived. And the solution—for it may be called a solution—arrived* at in Ulster, has been developed from that element of custom, for which they would not or could not find a place in the law.

One word as to the relation of the chief to the sept.

* Harris' *Hibernica*, 127, 128, 235.

There hangs over it great obscurity. Neither Davies nor Spenser exhaust the subject. They have told us the right of the chief over the sept; among which "coshery"—the right to free quarters on a progress,—and the usage of fostering, — the nurture of the children of the chief by members of the sept,—stand prominent: but they have not told us with equal explicitness the limitations of the rights, or the corresponding obligations of the chief. Nor is this surprising. When English rule broke up the system, the obligations lost their customary sanctions, and the rights became Irish exactions. These exactions were more apparent and more long lived than the obligations, and we read without astonishment in the recital of the Statute of Charles the First against coshering, that many young gentlemen, having little of their own, walked idly up and down, coshering upon the country and "sessing" themselves and their greyhounds upon the tenants of others.* Hence, while the obligations could not come within the range of law, the exactions could come, and it was a natural and just exercise of English rule on behalf of the Irish to put them down. But the strength of the tie between the chief and the members of the sept is shown by the continuance of fostering and the dependence of the tenants upon the native landlords down to the time of the Commonwealth, after the chiefs had passed into mere landlords.† The account also of

* 10 and 11 Car. I. c. 10. Irish St.

† The Interest of England in the Irish Transplantation. By R. Lawrence, Esq. 1655.

Sir Henry Piers relates some of the obligations of the chief or landlord under the national customs; and recent researches appear to prove that the chief was expected to supply stock and seed, and that thus among the ancient Irish existed the rudiments of a Metayer tenancy. But the evidence does not warrant us in going further, and in asserting in the time of James the First a community of property between the chief and the sept. Before that time, as we have seen, and as is shown also in the rule of succession to land by the Tanist, common ownership had been modified by the idea of separate property. Still less are we warranted in bringing down to our days a notion founded on this alleged community of property. The Irish gavelkind we have been examining is remarkable as the Brehon custom which has come down to us in a developed form, and nothing in it is more remarkable than the way in which it has been adapted, under the hands of the tenants, to succeeding phases of society. Between 1700 and 1845, though there is some community of property among the tenants, less complete apparently than in earlier times, there is no trace of common ownership between the tenants and the landlord. Towards him the tenants are simply lessees.

II. During the reigns of James and of Charles the First the land had rest for nearly forty years, and the rest, like every time of rest in Ireland however procured, brought material wealth and prosperity. But it was a rest galling to the Irish, who had suffered

from confiscations in the fortunes of war, and it was rudely broken in upon by the rebellion of 1641. Then came twelve years of war, when the island was more thoroughly subjugated than it ever had been before, and that war was followed in 1653 by the Cromwellian settlement.

This settlement provided for the Adventurers, who had advanced money for the suppression of the rebellion, and for the Officers and Soldiers who had served in the army in Ireland. At the accession of Charles the Second it underwent some changes in favour of dispossessed Royalists, but its chief provisions were ratified by the Act of settlement of 1662. For our purpose the results may be shortly told. It affected ten counties, Limerick, Tipperary, and Waterford in Munster; King's County, Queen's County, Meath, and Westmeath in Leinster; Down, Antrim, and Armagh, in Ulster. It differed from the preceding settlements and the subsequent settlement of William the Third, in planting in the country a body of small proprietors; but they were proprietors unfitted by their habits and training for an agricultural life. Like the preceding settlements, it was not fully carried out. One important part of the scheme was the transplantation of those Irish, who were entitled to favour under qualifications specified in the provisions of the settlement, into the province of Connaught, there to have lands set forth to them answering in value to the estates allowed to them under the qualifications. But when the time for transplantation arrived, difficulties of many kinds arose, and one from

an unexpected quarter. During their stay in Ireland many of the officers and soldiers had married Irish wives, and were unwilling to have their relations separated from them. Many were unused to tilling the soil, and wished to retain the Irish on their lots as servants. Two results followed, different from the results intended. Connaught remained unpeopled. And though the settlement did much towards destroying the old form of Irish society, it did not introduce an element of English civilization. The new settlers did not produce a change among the old inhabitants, but learned their ways. As early as 1682 Sir Henry Piers said that many sons of Englishmen in his neighbourhood had already become Irish in interest, education, and religion : and Primate Boulter, in the middle of the next century, made a similar complaint.

The war following the Revolution of 1688 brought the next and last great confiscation. We know its results with accuracy. The lands forfeited at the close of the war were situated in many counties, and amounted, according to the reckoning of the Commissioners appointed to inquire into Irish Forfeitures, to nearly one million eight hundred thousand English acres. The largest forfeitures were in Cork, Meath, Kerry, and Galway. Three hundred and seventy thousand acres were restored under the Articles of Limerick and of Galway. One hundred and eighteen thousand more were restored by His Majesty's favour. Above a quarter, therefore, of the forfeited property was restored, and so far no change was made in the manner of holding. Of the rest, nearly seven hundred

thousand acres were granted to eleven officers and other persons who had claims from losses or had distinguished themselves in the war, in lots ranging from two thousand to two hundred thousand acres; and the remaining six hundred thousand acres were sold in 1703 among five hundred purchasers. The effect of the settlement therefore was to introduce large and in many instances absentee proprietors.*

Towards the end of this period, a system was brought in, which exercised a powerful and in the end a harmful influence upon the tenure of Ireland, until it was put an end to in 1849. Some of the grantees of the confiscated lands, who did not wish to reside in Ireland, finding rents low and being desirous to attract tenants, let their lands on leases for lives renewable for ever. The Commissioners of Forfeitures, in 1700, recommended that this system should be tried in Connaught, on account of its desolate condition. The system found favour at first, for it appeared to convey a valuable holding, while the landlord retained legal facilities for recovering the rent. It stood prominent among the projects of the next century, and it was not till the latter part of that century that the evils of the system fully showed themselves. By that time difficulties and constant litigation had arisen, chiefly from a neglect on the part of the lessee to renew on the dropping of the lives. Then new complications arose. The lessee himself leased for lives renewable for ever, with a covenant to renew to the tenant on renewing himself, and the sublessee did the

* See "The Book of Postings and Sales," 1703.

same, till a chain of three or four tenancies was created. The tenants in the descending series ran the risk of losing their interests if the first tenant committed a forfeiture, and in the ascending series each ran the risk of losing his rent if the last failed to pay. We cannot wonder that a Judge, who had studied the tenure thoroughly, said that every abstract of title recorded a suit in equity, and that the experience of every day showed how uncertain was the duration of an interest under such a tenure. Mr. Lynch, writing in 1839, said that one-seventh, at least, of Ireland, was subject to this tenure; and he adds a remark well worthy the attention of those who propose measures of legislation tending to diminish the interest taken by landlords in their estates:—

“There is another party that suffers by this tenure, and that is the public; for instead of landlords occupying and improving their own estates, in immediate connection with their tenants, and encouraging and assisting them in improvements, and instead of tenants having a certain fixed term in the property by which they could safely measure their expenditure in the way of improvement, the landlord neither has, nor can have, an interest in improving the property, and the sub-tenants will not improve them when they have no certainty that the property will descend to their posterity. This tenure being founded on absenteeism, also takes away all inducement from landlords to reside in Ireland, and there is no reason why they should, for they have no land to manage or improve.” *

III. We now close the Roll of confiscations, and have

* Measures for the Employment of the Labouring Classes in Ireland. By H. H. Lynch, Esq., M.P., 1839.

to watch the forces we have seen introduced, at work in moulding Irish society. The period from the accession of Queen Anne to 1782, is the period of the Penal Laws affecting tenure; the period during which the continued repression of Irish manufactures, begun in the time of Charles the Second, threw the people back upon the land; and the period in which middlemen grew up.

In 1701 and 1703 were passed the two penal laws restricting the holding of land by Roman Catholics. By the first, an Act of the Imperial Parliament, every Papist was made incapable of purchasing any interest in the forfeited lands. By the second and more important law, passed by the Irish Parliament, every Papist was made incapable of holding land except for a term of less than thirty-one years, and at a rent of not less than two-thirds of its value. These laws continued in force till they were abrogated by the Act of 1777, which enabled Roman Catholics to take leases for any term not exceeding 999 years, and by the Act of 1781, which enabled them to purchase freehold estates.*

The mass of the population being Roman Catholics, the legislation of 1703 limited the term which could be granted to most of those who offered themselves as tenants, and brought into juxtaposition tenants' improvements and short tenures without compensation. To this characteristic of the period, which will soon

* 1 Anne, c. 32. 2 Anne, c. 6. Irish St. 17 & 18 Geo. III., c. 49. Irish St. 21 & 22 Geo. III., c. 24. Irish St.

become one of the main branches of our inquiry, we will confine our evidence.

Thirty years of renewed rest from war, and of attention to the pursuits of peace, sufficed to bring out the peculiar evils of Irish tenure. The following passage from the essay of Arthur Dobbs, on the "Trade and Improvement of Ireland," describing these faults, was written in 1729. For their cure the writer ardently desired to create a body of independent holders—in his own words—"a yeomanry." I have quoted from him at some length, because his evidence and his opinions are so intermingled that it is impossible to separate them. On reading him we must remember that he had not seen the results of the leaseholds renewable for ever :—

"Could I ever hope to see all our nobility and gentry so generous to their country, to their posterity, and I may say to themselves, as to fix the tenures and possessions of their tenants upon a lasting and certain foundation by leases of lives renewable, or fee farms, I would not doubt to find our people soon become industrious and frugal to the utmost. * * *

"The discouragements to improvements arising from our present method of letting our lands by short leases of twenty-one years is obvious to all. Places where the number of Papists is great, it is plain, will never be improved ; on the contrary, they will rather endeavour to impoverish the land, though bound by the strictest ties. This is occasioned by the shortness of their leases. We find very little improvement made in leases of thirty-one or forty-one years."

He points out that few improvements were made on the estates of Bishops, and continues :—

"How can lay landlords, whose estates descend to their chil-

dren, expect their tenants should improve upon leases determinable upon thirty-one or forty-one years, or even three lives? Have not tenants daily instances before them of landlords squandering away their time and money, and living upon their fortunes, upon the prospect they have of retrieving their affairs at the expiration of such leases, by raising extraordinary fines and selling their lands to those who offer most for them? Upon renewal the improving tenant must pay for the landlord's extravagance a sum equivalent to the improvement he has made, and the utmost value of the land, in case he has been so provident as to have acquired any money, which seldom happens upon such tenures; or he must give a nominal rent for the future if he renews his lease, otherwise the next person who offers a trifle more gets his land, and he is turned adrift, to serve in like manner the next whose lease is expired. Thus, where the landlord proves extravagant, he scarcely ever distinguishes between an improving and a non-improving tenant."

He describes it as a common practice for agents to put up leases to auction, engaging to accept the highest proposal. If a tenant therefore had improved more than his neighbour, or kept his house and lands in better order, he suffered because his improvements raised the value of the farm against himself when he came to bid for a renewal. This is the meaning of the word "overrated" in the following passage:—

"How, then, can a tenant improve his land, when he is convinced that after all his care and toil his improvement will be overrated and he be obliged to shift for himself? Let us place ourselves in his situation, and see if we should think it reasonable to improve for another, when that improvement would be the very cause of our being removed from the enjoyment of them. I believe we should not; industry and improvement go very heavily together, when we think we are not to have the property in either. What can be expected from covenants to

improve and plant, when the person to do it knows he is to have no property in them? There will be no concern or care taken to preserve them, and they will run to ruin as fast as made or planted. * * *

"Thus we see that this country at present suffers from the commonalty's having no fixed property in their hands, the want of which deprives them of a sufficient encouragement for improvement and industry. The present short tenures serve only as a snare to induce the nobility and gentry to be extravagant, arbitrary, and sometimes tyrannical, and the commonalty to be dejected, dispirited, and, in a manner, slaves in some places.

"Nor do I think it would be prejudicial to the public if such a method as this were introduced, viz., to give leases of lives renewable, or fee-farms, at a reasonable price, as lands are generally let in the country, and the landlord afterwards always, from seven to seven years, or from ten to ten years, to have it in his choice to take the first rent it was fixed at in money, or the third part of the produce of the farm annually in kind after the latter is deducted; so that he might have it in his power to agree with his tenant, for seven or ten years certain, for a sum of money to be paid annually for such third, or otherwise to take it in kind.

"By this means the landlord would have a certainty for the rent the lands were first set at, and also the proportional part of the increase made by the tenant upon the improvement of his farm, either in gardening, orcharding, tillage, or pasture, according to agreement.

"Such a tenure, I am convinced, would answer all the ends desired by the public as well as by the landlord and tenant. The public would reap all the benefits of the improvement made in the value of lands through the kingdom. The landlord would have a reasonable share of the improvement of his land and gradual rise of markets, and the tenant would have a permanent property in his farm, and a comfortable additional subsistence to his family by his improvements, care, and frugality."*

In 1738 a remarkable tract was anonymously published, called "Reflections and Resolutions proper for the Gentlemen of Ireland." The author was Dr. Madden, a clergyman greatly respected in his day, and distinguished for his efforts to promote the industry of Ireland.

One of the resolutions which he proposes to landlords to make is to build and to encourage their tenants to build. The houses, he says, both of tenants and cottiers, are in a wretched state, but their reformation would not prove difficult, especially in the case of families not of the poorer sort, if the landlords would give them little helps or lime, or allow them leases of thirty years at least, and the first year or half year's rent towards the buildings.

As Arthur Dobbs had mourned, so he mourns over the emigration which had recently taken place from the North of Ireland, and attributes it to want of care on the part of landlords. The emigrants, he says, would never have run the hazard had they received proper encouragement, good usage, and bargains here.

Then follows this passage :—

"But to return to our tenants. As for the better sort of them, who are a little able to bear the expense of building, they should have contracts in their leases, that they should be allowed such a sum for their houses when they expire, for otherwise it is expecting, as the Egyptians dealt with the Jews, that they should make bricks without straw. Such an allowance was ever appointed by the civil law to be made by the lord of the soil to the vassal, or else he was at liberty to remove or demolish them. This is now the custom in Saxony and Flanders, and it is

certainly but reasonable and equitable, and less chargeable than paying for repairs as they do in great part of England. Some of our laws as they now stand are great obstacles to building, particularly those which allow no tenures to Papists above thirty-one years, nor to Protestants, if on Church lands, above twenty-one, both of which might be removed by clauses from landlords of allowances for their dwelling-houses, at least when their leases expire: Our marriage settlements also are as great incumbrances in the point, which, together with the narrow way of thinking in most landlords generally averse to long leases, will be hard to be removed. I am persuaded, however, if we had an act to empower us, notwithstanding settlements or the Popery Acts, to set a lease for ever of only ten or twenty acres at most, even to Papist tradesmen, who would covenant to build good houses of lime and stone, and enclose, ditch, and plant the ground with a little orchard and garden, and three or four small parks, we should soon see many thousands of such improvements rising in our country, to our great profit and ornament, and the benefit of our manufactures. It is this has made the isle of Jersey all one garden, by its being broken thus into a large parcel of perpetual small freeholds; and we should feel the same advantage from it, and yet our rent rolls would rather rise than sink hereby, as the bulk of our lands would continue to be let on short leases.”*

This period was closed by two great authorities—Edmund Burke and Arthur Young. In his *Tracts on the Popery Laws*, Burke thus wrote:—

“A tenure of thirty years is evidently no tenure upon which to build, to plant, to raise enclosures, to change the nature of the ground; to make any new experiment which might improve agriculture; or to do anything more than what may answer the immediate and momentary calls of rent to his landlord, and leave subsistence to the tenant and his family. * * * ”

* Reflections and Resolutions proper for the Gentlemen of Ireland. Dublin, 1738.

"But it is not enough that industry is checked by the confinement of its views; it is further discouraged by the limitation of its own direct object, profit. This is a regulation worthy of our attention, as it is not a consequential, but a direct discouragement to melioration; as directly as if the law had said in express terms, 'Thou shalt not improve.'

"But we have an additional argument to demonstrate that the policy of denying the occupiers of land any solid property in it. Ireland is a country wholly unplanted. The farms have neither dwelling-houses nor good offices; nor are the lands almost anywhere provided with fences and communications; in a word, in a very unimproved state. The landowner there never takes upon him, as is usual in this kingdom, to supply all these conveniences, and to set down his tenant in what may be called a completely furnished farm. If the tenant will not do it, it is never done. This circumstance shews how miserably and peculiarly impolitic it has been in Ireland to tie down the body of the tenantry to short and unprofitable tenures. A finished and furnished house will be taken for any term, however short; if the repair lies on the owner, the shorter the better. But no one will take one not only unfurnished, but half built, but upon a term which, on calculation, will answer with profit all his charges."

Arthur Young visited Ireland between 1776 and 1779. Every page of his Tour is interesting. But we naturally turn to the chapter on the Tenantry, from which are taken the following sentences which contain the summary of his conclusions, and are all our space admits of. He saw Ireland in the hands of middlemen and "jobbers," and says:—

"In a word, the case is reducible to a short compass; intermediate tenants work no improvements; if non-resident they *cannot*, and if resident they *do not*; but they oppress the occupiers, and render them as incapable as they are themselves unwilling.

* Burke, Tracts on the Popery Laws.

The kingdom is an aggregate proof of these facts ; for if long leases, at low rents and profit incomes given, would have improved it, Ireland had long ago been a garden."

"The first object for a landlord is a settled determination never to be departed from, to let his farms only to the immediate occupier of the land. By no means to reject the little occupier of a few acres from being a tenant to himself, rather than annex his land to a larger spot. Having by this previous step, eased these inferior tenantry of the burden of the intermediate men, let him give out and steadily adhere to it, that he shall insist on the regular and punctual payment of his rent. The meanest occupier to have a lease, and none shorter than twenty-one years, which I am inclined to think is long enough also for his advantage."

IV. The period from 1782 to the great famine of 1846, may be described as the period in which the present state of Irish society was formed. In those sixty-four years, the Irish people went through social experiences rarely crowded into two generations of a nation's life. In 1779, just before the commencement of this period, the population of Ireland was estimated at three millions. By 1821, it had reached six millions eight hundred thousand, and in 1841, it exceeded eight millions. In 1782, a great part of Ireland was under lease to middlemen, though even then the immediate occupier of the land often, if not generally, held without lease. By 1846, middlemen had nearly disappeared, and the landlord dealt directly with his tenants; and between 1782 and 1846, the country had passed through a time when leases were very common to a state of tenure from year to year. By the close of the period, the relations of landlords and ten-

ants had assumed the shape in which we now find them. Since then, some of the relations have indeed undergone a change in their respective proportions ; but in substance, the questions now before us were put before the country by the Devon Commission, which in 1845 reported on the Occupation of land in Ireland.

The Acts of 1777 and 1782 enabling Roman Catholics to hold leases of more than thirty-one years and freehold estates produced immediate and marked effects. They gave an impulse to tillage, and led to a great increase in the number of the holders of land. In 1793, when a Bill was brought into the Irish Parliament for giving the franchise to Roman Catholics, it was opposed on this very ground as injuring the Protestant interest, because, it was said, the large farms which a few years before had been all in pasture ground, and occupied by a single Protestant farmer, were now tenanted by Catholic landowners, so that seven or eight Catholics held the land formerly held by one Protestant.* The Bill became law ; and nothing will meet us more strange than the incidental and unexpected effects which some years later ensued. Irish tenants at that time voted uniformly with their landlords, and a man's political influence depended on the number of tenants he brought to the poll. For the sake of political influence, from 1800 till about 1820, when the effects of their policy became clear, the influence of the landlords or of the middlemen whom the landlords had put into their own places, and to whom they had delegated their func-

* Parl. Register. Ireland. XIII. 207.

tions and their power of guiding the destinies of their country, was exerted towards the subdivision of the land. In many parts they cut the country up into forty shilling freeholders. More leases were given then than at any time before or since. Terms of thirty-one, twenty-one, fourteen or seven years were granted, with a life or lives thrown in to create a freehold of the smallest area — as minute sometimes, it is said, as two acres — which a tenant could swear to be of forty shillings value. The practice is mentioned by a number of contemporary witnesses within the sphere of their own observations; but it would lead us too far astray to follow the evidence. We may rest content with the sentence in the Report of the Devon Commission, that after the passing of the Act of 1793, “the landlords and middle-
“men found the importance of a numerous following
“of tenantry, and subdivision and subletting being by
“this law indirectly encouraged, greatly increased.”*

The point is of importance, because it is not uncommon to refer to the extreme subdivision of the period as owing to some fatal vice of the Irish character, too inveterate to be checked by moral motives, and as proving the impossibility of a peasant proprietary continuing to exist long in Ireland in comfort and prosperity.

No one, I think, will deny that it is a problem of

* Shaw Mason's Statistical Account of Ireland, 1816, vol. iii. 233. Grievances of Peasantry of Ireland, 1822. Minutes of Evidence, H. L. 1825. Evidence before Devon Commissioners. Mr. Kincaid. 7. Q. 15. 33 Geo. III. c. 21. Irish St. 10 Geo. IV. c. 8.

great difficulty to calculate the direction and value of the resultant of the antagonistic forces which will tend to support or to destroy a peasant proprietary in Ireland : but this very difficulty should make us the more careful to estimate the forces aright. In reasoning from the past to the future, we must remember that the influence and example of landlords will not for the future be thrown, as it was thrown in the past, into the scale of subdivision.

The political cause which led to subdivision has presented itself first to our notice as being first in chronological order ; but a more powerful cause was the increase of value in Irish produce, and the ease with which rents were paid during the long war. In presence of the war the restrictions upon the importation of Irish produce into England gave way. First, the ports were opened, and in 1806 trade in corn with England was made free. Cultivation in Ireland was extended ; the demand for labour was very great ; the population rapidly increased, and with the increase, the land became more and more subdivided.

This was a state of things which could exist only under war prices. Peace, in 1815, brought on a crisis, and land fell in value suddenly and rapidly. Both the immediate occupiers and the middlemen were unable to pay the rents reserved. For miles together the country was abandoned by the tenants.* The Statute of 1816 already referred to as introduced to facilitate ejectment, recites that tenants held over without pay-

* Hansard, Parl. Debates, March 15, 1816.

ing, that tenants deserted their tenements in debt, and that they made away with the crops. The distress was aggravated by a bad year in 1817, by the failure of some of the country banks in 1819 and 1820, and by famine in 1822. The system of management hitherto pursued was now seen to have broken down. "A general impression," said Dr. Doyle, the Roman Catholic Bishop of Kildare, to the Committee of the House of Commons appointed in 1830 to consider the state of the poorer classes in Ireland, "was produced in the minds of all persons that a pauper population spread over the country would go on increasing, and the value of the land at the same time diminishing, till the produce would become insufficient to maintain the resident population."

The great evils of the time are set out clearly in a Report of the House of Lords in 1826. They were the minute subdivision of land; the number of persons intervening between the head landlord and the immediate occupier; the extreme difficulty of preventing the subletting of land, and the power possessed by every intermediate landlord to distrain upon the occupying tenant.*

To meet these evils, the landlords became anxious to substitute for middlemen a system of personal management, or of agency, so as to be in immediate contact with their tenantry, and to consolidate their farms. This change was alike necessary and wise, and of unmingled benefit both to the landlords and to the tenants who were allowed to remain in possession.

* Report of Commission, II. L. Parliamentary Papers, 1826.

But it was carried out under a panic, harshly, and without provision for the tenants who were dispossessed with a view to the consolidation of the farms ; and to them it brought, in the language of the Committee of the House of Commons of 1830, " a fearful extent of suffering."*

Nothing will be gained by dwelling on that suffering beyond what is necessary for our inquiry. To these ejectments and clearances of estates must in a great measure be traced the chafing of the Irish under the system of management then introduced ; and from them are to be dated their reiterated appeals for protection against harsh and capricious eviction.

In the period before us the system of leaving improvements to be made by the tenants reached its climax, and began to be modified ; and in this period also it attracted the attention of English statesmen and of Parliament. We have observed the system in the last century, but it was of still earlier origin, for Sir William Petty, in his valuation of Ireland in 1672, makes one entry for the value of the land to the landlords, and another with the heading, " Benefit of leases and tenants' improvements."† It is a system which grew up naturally, and, notwithstanding the objections urged against it, the system is in many respects the best suited, at least with some modifications, to the peculiar conditions of Ireland. Ireland

* Report of Committee on the state of the Poorer Classes in Ireland. H. C., 1830, p. 8. Minutes of Evidence. H. L. 1825: p. 59.

† The Political Anatomy of Ireland, 1672.

is a land of small holdings, and it would be very difficult for any proprietor, not possessed of ample means, to build a cottage and a byre for every holding. The system, therefore, is convenient to the landlord. It is no less to the taste of the tenant. The landlord, if he builds must charge the tenant interest upon the expenditure incurred, while the tenant, when he builds, incurs no actual outlay, except for some of the materials, but expends labour of his own and of his family, which would not have been exerted at all but for the building. It is, therefore, for the advantage of the tenant to build, and to save the interest he would have to pay to the landlord. Again, the landlord would almost of necessity build on a scale which the Irish tenant would not appreciate. The Irish tenant prefers a low degree of comfort in his dwelling, and the pleasure of hoarding his money. He may be mistaken in the extent to which he indulges his taste, but his mistake must be treated with respect, for his cabin preserves morality under circumstances in which in England we pronounce morality impossible. Nor is he singular in his taste ; he shares it with the small holders of France. There are, however, some results of the system which must not be overlooked. It makes the landlord and the tenant co-partners in the results of the cultivation, especially in the reclamation of Bog Land, where the reclamation gives the land nearly all its value, in shares of which the respective proportions are not easily defined, and are open to misunderstanding. It raises in the mind of the tenant a sentiment of proprietorship. No reason-

ing will dislodge the sense of ownership felt by the peasant who has built a cabin on an acre of mountain land reclaimed by himself, even though the reclamation may have been affected by means as rude as a few cart-loads of lime, and the reclaimed soil grow only potatoes and a scanty crop of oats.

Without a doubt there is a sentiment towards the land in Ireland, different from anything we have in this country, and for a parallel to which we must go to France. It is distinctly traceable to causes at work in this period. The national part of the sentiment is traceable to the revival of the feeling of nationality by the French Revolution—a feeling which the evidence of Swift and the want of interest shown by the Irish in the Scotch Rebellions of 1715 and 1745 prove to have become dormant after 1700; and the individual part of the sentiment is traceable to the fact that from 1700 to 1820, the great body of the peasantry were left to do as they liked or as they could with the land, and the great body of the landlords accepted or chose the position which in England we assign to the owners of rentcharges. These results of the system shew the necessity of having the relations of the two parties accurately defined by contract, or in the absence of express contract, clearly determined by law. In Ireland, at the present moment, these relations are neither accurately defined by contract, nor clearly determined by law.

Let us now pass on to evidence respecting tenants' improvements. It is not so much the amount of the

improvements, as the system which must engage our attention. Mr. Steuart Trench, in his evidence before the Committee of the House of Lords in 1867, described one barony, of about forty thousand Irish acres, as having been valued, in 1769, at £8,000 a year. By 1837, the rental had risen to £54,883. The general rise in the price of produce and in the value of land, contributed, of course, to this rise of rent, but the main cause, he said, beyond all question, was the necessity of cultivation due to the rapid and enormous growth of population. In 1841, there were eight thousand tenants, representing a population of forty-four thousand persons, a human being for every acre. "This vast population," he continued, "driven to extremities to support themselves, gradually converted by their own labour, the land of the barony from being a waste, unenclosed alder-plain, into one of the most cultivated districts in Ireland, well enclosed and arable land, while scarcely an acre of reclaimable land, now lies unreclaimed."*

Wakefield sums up the observations on this head scattered through his two volumes on Ireland in the sentence, "The landlord has no repairs to make."† The subject was insisted upon before the Committee of the House of Lords of 1825, by Mr. Shaw Mason, who, from an official position which brought him into communication with the clergy, and from being entrusted with the conduct of the Census of 1821, spoke from

* Report of Committee on the Tenure (Ireland) Bill. Q. 19.

† Wakefield, i. 307.

wide experience, by Mr. Foster, and by Sir Frankland Lewis. The evidence of the latter witness is of value, as the evidence of a sensible English landlord who had acquired some official knowledge of Ireland:—

“What are the circumstances in the present law between landlord and tenant which appear to you to conduce to the disturbed state of Ireland?”

“I can answer that question only as a landlord, and certainly not as a lawyer. It is impossible for any person who knows the relations between landlord and tenant in England, not to be struck with the differences in the relation between landlord and tenant in Ireland. I am imperfectly acquainted with the laws or the circumstances which have brought about that effect. Nothing is more striking in Ireland than that a number of burdens which English landlords are willing to take upon themselves the Irish landlords do not find it necessary to take upon themselves. In the maintenance of a farm in England all the expensive part of the capital employed upon a farm is provided by the landlord; the houses, the gates, the fences, and the drains are all provided by the landlords. Everybody knows that in Ireland that is not the practice; at the same time that the landlord obtains as rent in Ireland a much larger proportion of the value of the produce of the land than he obtains in England, and in parts of Ireland it appears to me that the landlord sometimes obtains for rent more than is produced by the land. I believe in some parts of Ireland, where the linen-weaving is established, more goes to the landlord in some cases than is produced by the land. I believe in some parts of Ireland, where the land is extremely subdivided, and where the cottier tenants are persons who live partly by labour for hire and partly by what they can extract from the small portion of oats or potatoes, and the cabin they have, they pay more rent than is actually the produce of the land. I have been informed there are parts of Connaught where it is not unfrequent that a man plants his potatoes at the proper

season, and shuts up his cabin, and goes to England and labours, and perhaps his wife and children beg about the roads; and when he comes back to dig his potatoes, with the wages of his English labour in his pocket, he is able to pay a larger sum for rent than he could have extracted from the land; but what system of leases, or what system of habits, or what combination of both, may have produced this in Ireland, and not in both countries, is that which would require long observation to answer." *

The system of tenants' improvements was modified when the landlords undertook the personal management of their estates; and some landlords tried the English plan, while others assisted their tenants in making the permanent improvements.

The Dukes of Leinster have for many years adopted the plan of erecting the farm buildings.

On the Duke of Devonshire's estate Colonel W. S. Currey, the agent, told the same Committee that after 1817 a lease of twenty-one years was granted, instead of the previous and longer terms, in order to check subdivision; and that improvements were made jointly with the tenants:—

"Are the expenses of repairs of fences defrayed by the Duke or the tenant?"

"Whenever a tenant is put upon a farm we endeavour to arrange proper farm buildings for him. If a man has property, I think it an object to induce him to embark his property upon it; and I say, if you will put up the farm buildings your rent shall be lowered; if you do half, I will pay the other half. Where the farm is a large one, perhaps a year's rent does the thing. Then in other instances, where I have thought it would rob the tenant's capital too much, I have agreed to lay out the whole of the money

* Minutes of Evidence. H. L. 1825, p. 39.

in buildings, and have added a small addition to the rent on that account. With respect to fences and draining, I have done a good deal of that at the Duke's expense; such as principal fences and leading drains, leaving the interior to be done by the tenant."*

I have selected this evidence, because it can easily be verified. Much more might be added, but this is enough to illustrate the system, and its modification in this period.

In 1835 Mr. Sharman Crawford introduced the first Bill into Parliament to give compensation to tenants for their improvements. He defended it by the evidence given before the House of Lords, and already referred to. It has proved to be the first of more than twenty Bills with the same object. Parliament and the country were neither of them then alive to the gravity of the subject, and the express contracts of the leases under which Ireland was then held interposed a difficulty, and caused opposition to the measure. Again, in 1843, Mr. Crawford brought the subject forward, and in consequence Sir Robert Peel promised an investigation, and his promise resulted in the labours of the Devon Commission.

The evidence on the system before us cannot be summed up more fairly than in the following passages from the Report of that Commission:—

* Minutes of Evidence. H. L., 1825, p. 185. Minutes of Evidence on Tenure (Ireland) Bill. H. L. 1867. Q. 2207. See also Lord Dufferin's Evidence: Minutes of Evidence of Committee on Tenure and Improvement of Land (Ireland) Acts. Q. 989, 990, &c.

"It is well known that in England and Scotland, before a landlord offers a farm for letting, he finds it necessary to provide a suitable farm house, with necessary farm buildings, for the proper management of the farm. He puts the gates and fences into good order, and he also takes upon himself a great part of the burden of keeping the buildings in repair during the term; and the rent is fixed with reference to this state of things. Such, at least, is generally the case, although special contracts may occasionally be made, varying the arrangement between landlord and tenant.

"In Ireland the case is wholly different. The smallness of the farms, as they are usually let, together with other circumstances, to which it is not necessary to advert, render the introduction of the English system extremely difficult, and in many cases impracticable.

"It is admitted on all hands, that according to the general practice in Ireland, the landlord builds neither dwelling-house nor farm-offices, nor puts fences, gates, &c., into good order, before he lets his land to a tenant.

"The cases in which a landlord does any of those things are the exceptions.

"The system, however, of giving aid in these matters is becoming more prevalent.

"In most cases whatever is done in the way of building or fencing is done by the tenant, and in the ordinary language of the country, dwelling-houses, farm-buildings, and even the making of fences, are described by the general word 'improvements,' which is thus employed to denote the necessary adjuncts to a farm, without which, in England or Scotland, no tenant would be found to rent it.

"Under the same common term of improvements are also included various agricultural operations, such as draining, deep treuching, and even manuring, which ought to stand upon a very different footing from buildings.

"It will be seen by reference to the Evidence, that many witnesses of various classes have spoken of the discouragement to

improvement that arises from the want of some certain tenure in the land.

"Some of these refer to the necessity for enforcing the grant of leases, as a remedy for this evil; while others again seem to think that the same end will be as effectually obtained by some legislative provision, securing to the tenant, under certain circumstances, a fair remuneration for any expenditure of capital made by him of labour or capital in permanent improvement on the farm.

"Although it is certainly desirable that the fair remuneration to which a tenant is entitled for his outlay of capital or of labour, in permanent improvements, should be secured to him by voluntary agreement rather than by compulsion of law; yet, upon a review of all the evidence furnished to us upon the subject, we believe that some legislative measure will be found necessary in order to give efficacy to such agreements, as well as to provide for those cases which cannot be settled by private arrangement.

"We earnestly hope that the Legislature will be disposed to entertain a Bill of this nature, and to pass it into law with as little delay as is consistent with a full discussion of its principle and details.

"We are convinced that in the present state of feelings in Ireland, no single measure can be better calculated to allay discontent, and to promote substantial improvement throughout the country. In some cases, the existence of such a law will incline the landlord to expend his own capital in making permanent improvements. In others, he may be called upon, on the eviction or retirement of tenants, to provide the amount for which their claims may be established under the Act."

A quarter of a century has elapsed since this passage was written, and necessary legislative measures still remain to be passed.

Lastly, Ulster tenant-right came into notice, and certainly gained greatly in strength, even if it did not actually spring up in the period under our review.

On this last point there has been some dispute. Many persons carry Ulster tenant-right back to the original settlement of Ulster; some looking upon it as a compromise made by the Undertakers with their tenants for having neglected to carry out fully the condition by which they were bound to give their tenants certain estates; others looking upon it as arising from the tenants of the original grantees being united to them for common defence, and being "kindly tenants rather than tenants for money." These, however, are mere conjectures. There is no evidence, as far as I know, showing the existence of the tenant-right even in the last century. Mr. Butt sees some proof in the rising of the Hearts of Steel in 1771, which was provoked by the refusal of the Marquis of Donegal to renew the leases on his estates in Down, Antrim, and Donegal, except on the payment of large fines. His refusal was felt to be a great hardship, but we do not find it treated at the time as a violation of any customary rights. On the contrary, in an account written in 1780, obviously by an author well acquainted with the event, for he enters into details not told in the historical accounts to which we are generally referred, there is no mention of any customary right, but the refusal is contrasted with the conduct which would have been adopted, as the author argues, by English landlords.*

* A View of the present state of Ireland, 1780, p. 53. There is a short account of one of the trials of some of the Hearts of Steel, in *The Gentleman's Magazine*, 1772: but no allusion to any customary right comes out in the evidence for the prisoners.

Lord Dufferin considers Ulster Tenant-Right as having originated during the war, and having arisen out of the increased value to the lessees in consequence of the rise of prices, of leases granted early in the war. He is corroborated by a statement made by Mr. Foster, that the leases of that time had, generally speaking, become beneficial to the occupying tenants of Ulster.* It is a remarkable fact, pointing the same way, that the custom was not mentioned in the early inquiries of the century, and was almost, if not entirely, unknown to Parliament till 1845, and then it was found to be a custom not acknowledged in law, but firmly established, and highly prized by the inhabitants of Ulster. The answer has often been quoted, which the agent of the Marquis of Londonderry, on whose estate in Down the tenant-right was fully acknowledged then as it is now, gave to the question of the Commissioners whether a curtailment of the tenant-right could be carried out without danger to the peace of the country. "I am sure," he replied, "it cannot. You would have a Tipperary in Down if it was attempted."† Since 1845 the merits and faults of the custom have been constantly discussed by every writer in Ireland, and before every Parliamentary Committee sitting to inquire into the state of Ireland. There are, I am told, one or two persons still living who say they remember the beginning of the custom about the

* Minutes of Evidence. H. L. 1825, p. 57.

† Evidence before Devon Commission, 105. Q. 42.

time at which Lord Dufferin places it, and that the payment made by the incoming to the outgoing tenant under the tenant-right was originally called a payment for peaceable possession.

Lord Dufferin thus described the custom to a Committee of the House of Commons in 1865 :—

“Tenant-right is a custom under which the tenant farmers of the north of Ireland, or, at all events, in those districts where that custom prevails, expect when they have occasion to give up possession of their farms, that their landlords will allow them to obtain from the incoming tenant such a sum as shall remunerate them for their improvements upon those farms. But at the same time, though I think that that is a perfectly legitimate definition of the custom of tenant-right as now understood, there is undoubtedly another element which exists, and which influences the operation which I have described. But that element is a very impalpable one, because, although of late, since the question has been agitated and the real elements of tenant-right have been analysed by public discussion, even the farmers themselves will describe their claim as a claim on account of improvements, there can be no doubt that the sums which were paid by the incoming tenant to the outgoing tenant very often had no relation whatever to the real value of those improvements, and the thing sold, instead of being called the tenant-right of a farm, which is now the term generally applied to it, used more commonly to be called the goodwill of the farm, and under that designation I think a different thing would be understood than a payment made for the value of the improvements into the enjoyment of which the incoming tenant was about to enter.” *

The evidence collected on the subject shows that

* Minutes of Evidence on Tenure and Improvement of Land (Ireland) Act. II.C. 1865, Q. 966.

Lord Dufferin is right in dividing the sum thus paid into two parts—the part paid for the improvements of the outgoing tenant, and the part paid for goodwill, or, as others have said, simple occupation. He also remarked that these parts vary inversely, the amount paid for goodwill diminishing in proportion to the value of the improvements. Practically the tenant-right is estimated between the incoming and the outgoing tenant, not upon the basis of the improvements so much as according to the scale fixed by the desire at the time for the plot of land which is the subject of transfer. The character of the landlord and the prospect of the rent remaining unaltered are most important elements of the calculation, and tenant-right rises as rent is low. Hence it is paid where there are no improvements to sell; and hence also if we separate as above the whole amount into two parts, we may say that the part paid for simple occupation represents so many years purchase of the difference between the rent at which the land is let, and the rack-rent which a tenant eager for the land is ready to give.

So far the transaction lies between the two tenants. The landlord must now be brought in. First, the incoming tenant must be approved of by the landlord and in some instances is selected by him. Secondly, the landlord has an admitted right to payment for arrears of rent out of the tenant-right money before any other creditor. So completely is this the case that

the tenants defend the custom on this ground ; and Mr. Steuart Trench expressed a decided opinion that as a mere money question tenant-right is practically in favour of the landlord, for the landlord is insured by the tenant-right against loss from arrears of rent on the insolvency of his tenant.* When the system is in full force, the whole transaction is arranged, if not in the office of the estate, yet with the cognizance of the agent. In some instances the agent endeavours to regulate the amount paid from the fear that an excessive payment will lessen the tenant's means to do justice to the farm. In these cases the arrears of rent are openly paid. Very often a landlord, averse to the consequences of the system, declares that he does not sanction the transaction. But the outgoing tenant leaves ; the incoming tenant brought to him by the outgoing tenant enters with his approval, and the arrears of rent are found paid: "He pretends, as it were," says Mr. Trench, "to know nothing of how this is managed ; he pockets the money produced by tenant-right, but still maintains that he does not acknowledge the system."

Mr. Kincaid, an agent of large experience, says :—

"Tenant-right means two or three different things. It means, in the first place, possession of the land, irrespective altogether of the state or condition in which you get the land and buildings. Secondly, it includes improvements made by the tenant ; they will increase the amount of tenant-right ; if the land be in a high state

* Minutes of Evidence. H. L. 1867. Q. 14.

of cultivation, and the houses and buildings in good repair, the tenant-right will be increased; thirdly, the question of rent will enter, to some extent, as an ingredient in the calculation, and associated with that will be the character of the landlord. They are nearly the same points, because if you get under what is called a good and liberal landlord, who does not charge very high rents for his land, a tenant will give a larger amount of tenant-right fine for a farm than he would under a very severe landlord, who screwed out the last penny he could get as rent for the land.”*

These are descriptions of the transaction, and not definitions of the right claimed. In 1852, when the late Mr. Justice Shee and Judge Keogh brought a Bill into the House of Commons for the protection of Ulster tenant-right, it became necessary to reduce the right to a legal proposition, and they thus defined it in one of the recitals of the Bill:—

“Whereas a right of continued occupation is enjoyed by the tenant in possession, subject to the payment of the rent to which he is liable, or such change of rent as shall be afterwards settled from time to time by fair valuation, with a right to sell his occupation to any solvent tenant to whom the landlord shall not make reasonable objection, and that such tenant shall not be evicted by the landlord without being allowed to sell his interest, or else being paid by the landlord the value thereof, as if sold to a solvent tenant.”†

The evidence must, I think, lead us to agree with Lord Dufferin in his account of the origin and date of Ulster tenant-right; and this date and origin invest the custom with greater importance than if it had to be carried back two centuries and a half, to causes

* Minutes of Evidence. H. L., 1867. Q. 1469.

† Parliamentary Papers, 1852-3. 7.

we could not assign. It must strike everyone that the custom is contemporary with the recent agricultural customs of England, of which we chose an instance in Lincolnshire, and like those customs, sprang out of a state of growing prosperity. The Ulster custom, like the Lincolnshire custom, is designed to cover labour and materials attached to the soil beyond the protection of the common law, for whatever name the payment took, the custom arose when the management of the soil was left wholly with the tenant; and like the Lincolnshire custom, it is a recognition, first between the tenants themselves, and when admitted by the landlord, between the tenants and the landlord, of the creation by the tenant of a property, beyond the scope of the maxims of common law. Similar motives are at work; similar interests have to be protected; but the customs have run different courses. The Lincolnshire custom would be admitted at the Lincoln assizes; but the Ulster custom has never been acknowledged as law. From time to time at the assizes in Ulster, counsel have offered evidence of the custom, but the Judges have always ruled the evidence to be inadmissible. Nor is it possible to dissent from this ruling. The maxim of law is a maxim of common sense—that a custom must be certain; and what “certain” means, may be illustrated by an old instance in our law books, where a custom to pay at one time twopence an acre in lieu of tithes, and at another time threepence at the pleasure of the person paying, was held bad for uncertainty. The payments in Lincoln-

shire are certain, because, however intricate the account, they are calculated on the basis of labour done. The payments in Ulster are not reducible to certainty. Still the custom does contain elements of certainty, and is easily capable—to borrow a word from the Statute of Edward the First, applied to the custom of Wales—of being reformed. The custom is on the brink of being a good custom. And it is a curious fact, which I can but record without attempting to explain, that having gone so far, it has not gone further, and been reformed, either upon the suggestion of some far-seeing judge, or through the necessities of the persons interested, into a good custom. But though not a good custom in law, we shall find later, I think, that it gives equitable protection to the tenant, and offers elements for a solution of the difficulties of Irish tenure, which no wise legislator can afford to neglect.

The new system of the personal management of landlords begun about 1820, was in full operation by 1840. With it came another change, which brings us to the present state of tenure. The sixty-one years leases, granted after the Act of 1777, and the later and shorter leases of twenty-one years—a common term after 1816—all fell in about this date. Then for a variety of reasons landlords refused to grant new leases. It has lately been said that the rebuff which their political power had met with by the election of O'Connell for the County of Clare, was a main reason. The evidence, however, already quoted, shows that far more powerful reasons had for some

years previously influenced them—the dread of a pauper tenantry, the sight of the subdivision brought about under the leases just expired, and the desire of having uncontrolled management of their own property. It seems to me fairer to say, that when the Act of 1829 raised the qualification necessary for the franchise, and political influence was no longer to be gained by carving out numerous and minute leaseholds, this motive in favour of granting leases ceased, and the reasons against granting leases were left to their full swing. The evidence before the Devon Commission shows that many tenants at that time were not very anxious for leases. The high stamp duty influenced some. Others who had suffered under the high rents demanded by middlemen and sublessees, probably hoped that when brought face to face with their superior landlords, the conditions of the bargain might be more moderate and more flexible without a lease. Both tenants and landlords anticipated dividing the portion of rent which had hitherto gone to the intermediate lessees. Nor has the anticipation proved false. The immediate contact of the landlord and tenant has resulted in an increase of the rent of the landlord, and a decrease of the amount paid by the tenant. Throughout the last century, and the first thirty years of the present century, the complaints of the excessive rents paid by the occupier of the soil were unvaried and uncontradicted; but at the present time, by the consent of nearly all who have examined the subject, Ireland is not overrented. So

far the tenants have gained by a system in which personal management, and the absence of leases, have been blended. Thus Ireland glided naturally into a stage of tenure without lease, of tenure, that is, according to law, from year to year; and in that stage the country still continues. To this tenure the remarks in the following pages are limited. And amidst the disadvantages presently to be enumerated, the tenure has one advantage; it admits more readily than tenure under leases with express covenants, of the application of legislative remedies.

V. The period from 1846 to the present time has been marked by the establishment of the Landed Estates Court, which has brought into full view the faults of the present tenure; by the increased share landlords have taken in improvements, which has sensibly modified the state of accounts between landlord and tenant; and by some legislation on the subject of our inquiry. We will take these three events in order.

From its first introduction as the general system in Ireland, tenure without lease began to betray its weak points. Introduced by the landlord then to facilitate the consolidation of farms, it necessarily rendered the position of tenants uncertain. The Report of the Devon Commission says:—

“The uncertainty of tenure is constantly referred to as a pressing grievance by all classes of tenants. It is said to paralyze all exertions, and to place a fatal impediment in the way of improvement.”

The evidence is almost unanimous that the sense of this grievance has gone on increasing.

In the second place, the tenure lodges too much power in the hands of landlords and agents; for it is obvious, without adducing examples, which might be supposed to be adduced to raise a prejudice, that energy in enforcing the rules made for the management of an estate will infallibly sometimes pass, and still more often appear to pass, into vexatious interference with the domestic affairs of the tenants.

Thirdly, the tenure leads to results of great hardship. We can draw a proof from the records of the Courts of Justice. There was a case tried in 1865, arising out of some evictions at Rathcore, in the county of Meath, which will offer us an illustration, not the less instructive because under the particular circumstances the evicted tenants recovered heavy damages from their landlord. The case deserves our attention, were it only that it is constantly referred to in Ireland.

The property upon which these evictions occurred contained about five hundred acres, and was held by the defendant in the case, Knox, for a residue of a term of ninety-nine years, expiring in 1883, and purchased by him in 1824. It was occupied by thirteen tenants, of whom the plaintiff, Clarke, was one. He occupied about eighty acres, a farm held by his family for forty years, at first under a lease of twenty-one years, and afterwards without lease. He was an improving tenant, and paid his rent with exemplary regularity. The agent, a man of honour and trusted by the tenants, managed the

property ; and Knox never interfered till 1861. This fact was a turning point in the case, as it made Knox responsible in law for the representations of the agent to the tenants. In 1857 one Dyas bought the reversion of the property as a speculation, and then sought to buy up the remainder of Knox's term. He wanted the property without the occupying tenants, and opened negotiations with Knox on the matter in December, 1863. The agent was throughout kept in the dark as to these negotiations.

Before this, in March 1851, the agent suggested to Clarke to take a lease for twenty-one years, and terms were proposed. A few days afterwards, Knox in person served a notice to quit on the tenants, telling Clarke that the notice was a mere form, intended to compel them to take leases. Clarke, in alarm, complained to the agent, who bade him not to be uneasy, since Knox was satisfied with the terms proposed, and would grant the lease. This notice to quit was not acted upon. The lease, though promised again and again, was not granted, and in March, 1863, another notice to quit was served. New complaints were quieted by encouragement to Clarke to go on with the drainage and stables he was beginning, as securely as if he had the lease. In 1864 ejectments were served. Clarke then discussed with the agent whether he should defend the ejectment. He did not want to vex Knox, but he was afraid, he said, of being "nobbled" by the Landed Estates Court. Again, the agent assured him, and begged him to assure the other tenants that Knox

would never disturb one of the Rathcore tenants. In January, 1865, Dyas appeared on the property with one hundred and twenty policemen, and the tenants were put out.

Clarke then sued Knox on the ground—it is worth noticing the circuitous mode of relief to which it was necessary to resort—that Knox having induced Clarke not to defend the ejectment by a promise and a fraudulent representation that he should not be evicted, evicted him. A special jury of King's County found a verdict in his favour, with £300 as damages.

There was one touch of bitter humour in the transaction. When Dyas appeared on the land, he said to Clarke:—"I will give you a piece of advice; as long as you live, never take land from any man without a lease. I was robbed in the same way in County Meath."*

It has been one of the incidental results of the establishment of the Landed Estates Court to bring the hardship of the tenure into full view. Between 1848, the date of the establishment of this Court under the title of the Encumbered Estates Court, and 1865, property to the value of twenty-five to thirty millions had been sold in this Court. Now, it is an inevitable result of the present state of things, that the improvements of a tenant without a lease not being secured to him by law must pass as part of the consideration for the purchase-money paid by the purchasers to the seller; and thus between the purchaser and the seller,

* Report of Case of *Clarke v. Knox*, Dublin, 1865.

the tenant goes to the wall. Had the tenant, as he ought to have, a legal claim for compensation for those improvements, he would have a claim, in proportion to their value, upon the purchase-money.

The strongest and most obvious cases of this hardship have occurred under Ulster Tenant-Right. The following is the evidence of Judge Longfield, then Judge of the Landed Estates Courts. It will go far to explain the growing fear of the destruction of this right :—

“ Is it not the fact, that practically, tenants have been handed over from one set of landlords to the other without much consideration of any claims that they might have ?

“ Without any consideration whatever ; I could not lawfully reject one man who came to bid for land, because he would be a worse landlord than another who would not give so much.

“ With regard to the north of Ireland where tenant right prevails, our court acts with peculiar hardship upon them by subdividing the land, and a tenant who had an interest in land which he could sell for £10 or £15 an acre, while he had a nobleman or gentleman of several thousands a-year over him, finds that he has substantially nothing at all when he has as landlord, a man who buys on speculation an estate of £100 or £150 a-year ; the existence of the tenant right is, in fact, a bonus to bad landlords, and enables them to outbid those who would be good landlords. I will give an example : supposing that the tenants on an estate pay £200 a-year, and their tenant right will probably sell for ten times that at least, very frequently for 10 years' purchase ; a good landlord, who does not mean to disturb the tenants, values it as an estate of £200, and a bad landlord, a man who is disposed to screw up the rent to the utmost legal sum which he can get for it, values it at £300 a-year : of course he will outbid the good landlord, that is, the landlord who will respect the old traditions of the estate.”*

* Minutes of Evidence. H. C. 1865. Q. 30. Q. 33.

This testimony from such high authority is, perhaps, sufficient, but I will add the evidence of another witness, Mr. Filgate, the agent for several large estates in the North of Ireland :—

“ Does not the operation of the Landed Estates Court violate the tenant right custom a good deal ?

“ There have been instances of persons having bought in the Landed Estates Court, and having paid a large price for the land, and then having considered that they ought to get a certain percentage for their money, and upon that serving the tenants with notice to quit.

“ What was the result in most cases ; did the tenant pay the rent demanded, or did he abandon the farm ?

“ In one case, which I have particularly in my mind, the tenants offered to pay something between what they were paying and what the purchaser wished that they should pay. It was ultimately so arranged.”*

To remedy this evil Judge Longfield wishes the Landed Estates Court to have the power of giving leases for twenty-one years to tenants, wherever the custom of tenant-right has existed with the knowledge of the landlord, because he thinks it reasonable, he says, that a stranger should not be put over a tenant without placing the tenant in as good a position as he was in by the custom of the country with his old landlord. The expression of this wish gave rise to the following questions :—

“ Do you think that such power would have any effect upon the marketable value of estates ?

“ Certainly it would, it would reduce the value of estates that were sold, because it would prevent a certain class of land jobbers

* Minutes of Evidence, H. L. Q. 1997.

from buying them with the intention of squeezing the tenants out of the estate; but any man who wanted to give the tenants the fair privileges which from time immemorial they had had upon such an estate, would willingly pay it.

"You admit that it would reduce the marketable value of the estate to the landlord?"

"I think it would deprive an estate of an unfair excess which the present law gives to the marketable value." *

The difference between the sum which the estate would fetch under lease, and the sum which it actually fetches without lease represents approximately the value of the tenant-right, or where tenant-right does not extend, the value given to the estate by the improvements of the tenants. Upon the sale this value goes into the purse of the seller. Popular feeling, however, in Ireland, has been directed against the purchasers, who have been branded with the nickname, charged with the traditional opprobrium of a century, of land-jobbers. Judge Longfield participates in the feeling. But this justice is not even-handed. Without a doubt, so far as the purchasers have attempted to screw up the rents of their newly purchased estates, they have been wanting in humanity; but the indignation which has been directed against them has diverted attention from the truth, that the person who has really wronged the tenant is the seller. The purchaser has only dealt with what he has paid for; the seller has received what Judge Longfield has called the "unfair excess." Had the interest of the tenant

* Minutes of Evidence. H. C. 1865. Q. 651, 652.

been in any way protected, the purchaser would have given, and the seller would have received less.*

The period before us is marked in the next place by the increased share which landlords have taken in the improvements made on their estates. The evidence on this point is unanimous, from whatever quarter we summon the witnesses, and however much those witnesses may differ in their reasons and their sympathies. In allowing them to speak in their own words, we must acquiesce in listening to their reasons as well as to their facts. On the side of the tenants no witness probably better qualified to speak can be summoned than the Rev. W. Keane, the Roman Catholic Bishop of Cloyne, who gave the following evidence on the subject before the Committee of 1865. He had then been twenty-six years in Ireland, and was widely acquainted with the Southern counties :—

“Is it the result of your experience that such improvements as are made in the country are made, as a rule, by the tenant and not by the landlord ?

“The periods may differ. I am not aware that any improvement at all (I never heard of any worth naming) was made by the landlords from 1780 until about 1840, for about 60 years. Since the sale of property in the Encumbered Estates Court, I believe that the landlords to a certain extent have done more in that way than they ever did before ; but, as a rule, it was the tenants who made the improvements and, as a rule, the tenants at this moment do not make the improvements, because they have

* I have no right to mention names not made public, but I believe some Irish landlords, from a conviction of the justice of the step, have given leases just before a sale of property, and received, in consequence, less for the property.

not the encouragement which they had from 1780, and the reason is that from 1780 they had leases, and hence the saying, 'He holds under an old lease,' was as common in the days of my boyhood as it is to say now, 'they have no leases at all.' They had leases then and the land was improved. After emancipation, the leases ceased to be a rule and tenancy at will stepped in, and that is what now has thoroughly checked the progress of improvement." *

Mr. W. Steuart Trench, who as the agent for several large estates, has peculiar means of obtaining information, gave evidence before the Committee of the House of Lords in 1867, with sympathies as little concealed as those of the last witness, but on the side of the landlords :—

"There is no more frequent assertion made than that the landlords of Ireland do nothing, and that the tenants do all, build, drain, and make every improvement which is made on the soil of Ireland. It is impossible to conceive a more utterly false assertion. I by no means desire to deprive the tenant farmers of Ireland of any credit to which they are entitled. My experience is considerable, and I will do them the justice to say, that except where misled by agitators, I have generally found them reasonable, upright, and fair ; and where able, most willing to join their landlord in effecting permanent improvements. It becomes my duty, as head manager over four estates situated in four different counties in Ireland, to be responsible not merely for the collection of the rents, but for the judicious expenditure on the improvements carried on upon those estates. Some of them, from various causes, were in a very bad condition, when first entrusted to my charge ; whereupon I usually reported to the landlord the steps I would recommend to be taken, and these having been approved of by him, a large but steadily regulated expenditure in improve-

ments has been the result. I will take the liberty of giving a few figures for the information of the Committee."

These are the figures, put in a tabular form. The first two estates were situated in the Midland Counties; the third was in the North, and the fourth was in the South of Ireland.

	Rental.	Number of years over which expenditure was spread.	Land Improvement, drainage, building, repairs of tenants' houses.	Compensation for surrender of tenements.	Emigration.	Sundry Improvements.
1.	£15,000	10	£26,867	£3,362	£589	£1,977
2.	£8,000	5	£5,385	£225	£11	£961
3.	£20,000	16	£33,984	£2,831	£7,988	£4,178
4.	£11,000	17	£22,222	£3,948	£17,059	£11,129

Mr. Trench then continued:—

"It must be admitted that these estates had been much neglected previous to the improvements which within the last seventeen years have been undertaken by the proprietors; but Ireland has much changed of late, and few proprietors now forget that property has its duties as well as its rights. Evictions on these estates have been very few and very rare. The most liberal compensation has been given to outgoing tenants who became bankrupt and could not pay their rents, even for fancied improvements, where almost none had been really effected, whilst the large sum expended on emigration was given almost exclusively to those who had taken refuge in the poorhouses in the years 1851 and 1852; their holdings being so small as to be wholly unable to support them without the potato, which had then failed as a national food. A large amount of the expenditure on build-

ings was given in aid of repairs, the tenant frequently undertaking to do all the manual and horse labour, the landlord giving slates and timber for new roofs, windows, floors, and doors. I have found it far more economical to turn bad houses into good ones, by slated roofs and other improvements, than to build anew. Whenever tenants have improved to any considerable extent, leases varying from twenty-one to thirty years, and sometimes with the life of the lessee included, have in many cases been granted. It appears to me that one of the chief reasons why Irish landlords do not improve their estates still more is the difficulty of obtaining competent persons to secure that good value should be obtained for their expenditure."

Another witness, Mr. C. W. Hamilton, an agent who has the management of estates to the extent of about fifty-six thousand acres in Meath, West Meath, and Kildare, described it as the "greatest calumny possible" upon the landlords to say that they do not make improvements. He continued:—

"Upon five estates which I manage, since 1847 we have spent on building and different improvements by the landlords, £28,749. There has not been more laid out, because those estates have been long under the management of my father and my grandfather before myself, and I wish to point out the mode in which money is advanced, because although in many cases the houses have been built from bottom to top by the landlord, and some increase of 5 per cent. charged upon the outlay, yet the prevailing custom, and the custom upon which I have always acted in preference to any other is, when a tenant wishes to make any improvement, to say to him: 'If you will build good walls, which you can do very cheaply by drawing the materials yourself, and getting the work properly executed, I will give you the timber and slates,' which is what would take money out of the tenant's pocket. That has been done invariably, and no additional rent has been charged for that, it being a co-operative work between landlord and tenant."

To these instances he added others from his own observation. On one estate in the county of Wicklow the annual cost of building farm-houses for tenants had been, he said, £7000 a year. On the Duke of Leinster's estate during the preceding six years the expenditure on buildings had been £17,503. Then, passing from these large proprietors, he added :—

“I think that there are numbers of small proprietors who assist in building houses without the actual expenditure of money, though quite in the same way as if the money was taken, out of their pockets. For instance, in the case of one proprietor, a lease fell out lately, and three tenants were anxious to get portions of it, of forty or fifty acres each. The landlord said : ‘It is not convenient for me to spend the money, but I will give it to you for your own life, or thirty-one years, provided you expend each of you £300 on building a house.’ Those houses are completed now ; the agreement is a perfectly satisfactory one to both landlord and tenant ; and I believe that the money, though it came out of the tenant's pocket, may be considered to have been actually the landlord's money, because he has given compensation for thirty-one years in the shape of reduced rent. There are numberless instances of that kind all over the country.”*

One more witness will suffice. Mr. Kincaid gave evidence well worth attention, both because it does not display, like the evidence of the former witnesses, the temper of a partizan, and because it describes an arrangement which is gaining ground in Ireland :—

“Do you not think that it would be better that the landlord should make the improvements for the tenants ?

“No ; my opinion is that it should be done between them. I have

* Minutes of Evidence. H. L. 1867. Q. 2206, 2207.

managed estates for many years now, and I have always found mutual co-operation the most effective and the most agreeable mode to both parties. The tenants do not take sufficient care of the improvements when they have not a share in them. I always find that in order to induce the tenants to take proper care of fences or drainage, or farm buildings, or anything else, it is essential that they should have a personal interest in them themselves."

He said, the principle of co-operation between landlord and tenant had, he thought, been extensively applied in Ireland. And to the question whether this principle had been applied to small estates as well as to large estates, he answered—

"Generally speaking, I think it would apply to the estates of noblemen and gentlemen possessing large property. I could not predicate that it has been generally done on estates of smaller men, of men under £1,000 a year, although it has been done to some extent. I think, since 1846, there have been very few large estates in which there have not been very extensive improvements carried on, under the supervision and direction, and, perhaps, with the assistance of, the landlord."*

The course of our argument has led us to notice an incidental result of the Landed Estates Court, before noticing its chief effects. We must keep in sight what has been already mentioned, that by this time more than thirty millions of property have passed through the Court. This property has been bought in holdings of various sizes, by persons of different ranks, but chiefly by Irish purchasers. They hold under a Parliamentary title. The great majority of them, we are told by Dr. Hancock, who from his ac-

* Minutes of Evidence. H. of L. Q. 1050, &c.

quaintance with the working of Irish institutions is well entitled to speak, have acted, as was expected, when it was sought to replace their needy predecessors by wealthy and solvent purchasers, and have been a blessing to their tenants.*

Two other Acts of this period deserve attention. One of them, the "Landlord and Tenant Act, 1860," declared the relation of landlord and tenant to be founded on contract and not on tenure, and simplified the forms of leases.†

The other Act, "The Landed Property (*Ireland*) Improvement Act," attempted to deal with family settlements and compensation to tenants.

The difficulties imposed by settlements, which had been complained of one hundred and twenty years before by Madden, were partially removed. Tenants for life under settlements, are empowered to grant Agricultural leases for terms not exceeding twenty-one years; Improvement leases for terms not exceeding forty-one years; and Building leases for terms not exceeding ninety-nine years: the Improvement and Building leases requiring the sanction of the chairman of Quarter Sessions; while Building leases for still longer terms may be granted with the sanction of a Judge of the Landed Estates Court.

The Improvements contemplated in agricultural leases

* Two Reports on the History of the Landlord and Tenant Question in Ireland. By W. Neilson Hancock, LL.D., 1869. p. 35. These reports are valuable and interesting, and enter into details and contain information which these pages cannot give.

† 23 & 24 Vict. c. 154.

include Drainage, the Reclamation of Bog land, the making Farm roads, Irrigation, the Protection of land by embankment from Inland Waters, and the erection, enlargement, and repair of Farm houses and other agricultural buildings suitable to the holding.

It is said that the restrictions of the Act have interfered with its operation.

The provisions relating to compensation to tenants are in substance these. A landlord, notwithstanding any settlement, is allowed to come to an agreement with his tenant for the execution by the tenant of any of the improvements above enumerated. In the absence of an agreement, the tenant may serve on the landlord or his agent, a notice stating the particulars of the improvements he intends to make, the proposed manner of effecting them, the estimated expense, a description of the land to be charged for them, the time for commencement, which is to be not less than three months from the service of the notice, and the time for completion, which is not to be more than two years. The owner, or his agent may then give a counter notice within three months of his disapproval of any of the intended improvements, and the tenant is not at liberty to commence the work disapproved of. Upon the completion of the improvements, or if evicted, upon his eviction, the tenant is to lodge with the Clerk of the Peace a statement of the expenditure incurred not exceeding the amount in the notice of improvement; and the Clerk of the Peace is to serve on the landlord, or his agent, a notice of the statement, so as to give him

the opportunity of coming in and being heard; and after due hearing in the manner provided by the Act, the chairman of Quarter Sessions may charge the lands with an annuity of £7. 2s per cent. for the improvements allowed for twenty-five years.*

This part of the Act has remained a dead letter; chiefly, it was said in the evidence before the Committee of the House of Commons appointed to inquire into the subject in 1865, for two reasons:—first, because the compensation is inadequate; and secondly, because its form is inconvenient, a lump sum, and not an annuity being required by tenants.

About two years before these Acts were passed, a case came before the Court of Chancery in Ireland, which excited great interest, and the full importance of which we shall best appreciate after having examined the facts, and listened to the Judges who decided it.

In 1849 the Roman Catholic priest of a parish in Galway, Dr. O'Fay, at the suggestion of the landlord, Mr. Burke, made a proposal to take a farm in the parish of about thirty Irish acres, at a rate of £1. 5s per acre, for a lease of three lives and thirty-one years after, with an allowance towards putting the premises in repair. Dr. O'Fay entered while the negotiations were still pending, and Mr. Burke finding he had not power under his settlement to make the lease proposed, offered, in a letter of March 26, 1849, if Dr. O'Fay chose to take the farm in the usual way, to allow

* 23 and 24 Vic. c. 153.

£20 towards the cottage, and a lease for life. Dr. O'Fay gave no written answer to this letter ; he continued to occupy, paying the rent at which he had entered, apparently a little less than £1. 5s an acre ; he neither asked nor received the £20 ; he expended about £60 on permanent improvements, and there was a friendly feeling between him and his landlord. On Burke's death, in 1854, Dr. O'Fay applied to his son who succeeded him, for a lease for three lives and thirty-one years, and was answered by the agent, that the younger Burke would not make any lease on his property. Burke at this time joined his regiment in the Crimea, and after his departure, the agent wrote to Dr. O'Fay, saying, that he was serving notices by the instructions of Burke on all the tenants from year to year, preparatory to raising their rents on account of the enhanced value of land, and of all farm produce ; but that he would not serve him with a notice without first writing to ask him to send a proposal for increased rent. Dr. O'Fay replied that he was not a tenant from year to year, but held under the letter of March 1849. He added, " I leave my case in your hands at present ; there is no need for sending in a further proposal, particularly as a lease will not be granted on any part of the property." On receiving this letter the agent forbore to send the notice, and did not raise the rent. Burke, on the hearing of the case stated that he did not know of the letter of 1849, and had not authorized this conduct of his agent. Dr. O'Fay now spent above £500 upon improvements and the

erection of buildings, “under a *bond fide* expectation,” as one of the Judges said, “reasonably entertained that “the possession would not be disturbed.” And the evidence proved that Burke on his return saw the expenditure which was being incurred. An accident brought on a dispute. Burke’s own farm adjoined that of Dr. O’Fay ; and “an unruly ram” belonging to Dr. O’Fay got over the boundary between the two farms, and caused the litigation. Burke brought an action of ejectment against Dr. O’Fay, and obtained judgment, subject to an application to the Court of Chancery to compel Burke to fulfil his father’s promise of a lease. The Master of the Rolls, before whom the case first came, refused the application of Dr. O’Fay. As a matter of law, he held him to be a tenant from year to year ; and the case to be governed by the rule of law that a tenant from year to year who makes permanent improvements without any expectation held out by his landlord, does not thereby raise an equity as against the landlord, though the landlord may have looked on and not given any warning to the tenant.

He concluded his judgment in these words :—

“ Even if the Rev. Dr. O’Fay had no claim, except as tenant from year to year, I have no hesitation in stating that, although in point of law, on the authorities I have referred to, and particularly the case of *Pilling v. Armitage*, the petitioner’s suit could not be sustained, yet nothing can be more repugnant to the principles of natural justice than that a landlord should look on at a great expenditure carried on by a tenant from year to year, without warning the tenant of his intention to put him out of possession.

The defendant's offer to allow Dr. O'Fay to remove the buildings was a mockery. I think it probable that the case will be relied on in the next Session of Parliament as affording an argument in favour of a Tenant's Compensation Bill for Ireland; and if this was not an exceptional case, it would, I have no doubt, lead to legislation on the subject. It is however due to the landlords of Ireland to state that, so far as I can form an opinion from the cases which have come before me in this Court, there is rarely a case of such oppression and injustice as the present.

"I have no jurisdiction to administer equity in the natural sense of that term, or I should have no difficulty whatever in making a decree against the defendant. I am bound to administer an artificial system, established by the decisions of Lord Eldon and Sir William Grant, and being so bound, I regret much that I must administer injustice in this case, and dismiss the petition; but I shall dismiss it without costs. I should be very glad, for the sake of justice, that my decision should be reversed by the Court of Appeal."

The Court of Appeal affirmed the judgment. The Judges, looking at the rent he actually paid, and his not having received the £20, considered Dr. O'Fay to be a tenant from year to year, occupying not upon the terms of his own proposal or of the letter of March 1840, but upon the terms upon which he had entered pending the negotiation.

With regard to Burke's cognizance of Dr. O'Fay's expenditure, one of the Judges said forcibly that he could not draw from the evidence the conclusion of fact that Burke knew of Dr. O'Fay's expenditure, much less acquiesced in it, with the knowledge of his claim to a lease under the letter of March 1840. The Judges, therefore, held the case to fall under the rule of law laid down by the Master of the Rolls. They

showed their sense of its general merits, by replying to the application made on behalf of the defendant for costs, that the landlord could pay himself out of the improvements he was getting possession of.*

There is one unsuccessful effort at legislation in this period which must not be omitted. In 1852, the present Sir John Napier, then Attorney-General for Ireland, in Lord Derby's government, brought in a Tenants' Improvement Bill, with a clause for retrospective compensation.† This Bill forms an era in the history of the subject, for it has removed the question of retrospective compensation from being a party question, and has handed it over entirely to equity and morality.

Such are the leading facts of Irish tenure. Let us now place them, as was proposed, by the side of the principles of English law, and the judicial decisions of our Courts on cases most nearly parallel, and mark the points of resemblance and of difference. There can, I think, be no doubt that the present tenure of Ireland, tried by English law, is an anomalous tenure. A tenancy from year to year, with an understanding that the tenant is to do permanent improvements, and without a correlative custom of the country for his protection, is happily not the tenancy from year to year known to English experience. Our experience shows us, on the one hand, limited agricultural im-

* Irish Ch. R. VIII. 225, 511.

† Parliamentary Papers, 1852—53. 7.

provements made by tenants and protected by customs of the country ; and, on the other hand, particular cases where buildings erected or improvements made by tenants without leases, either under some supposed special bargain which is found when a dispute arises not to exist, or in reliance upon the honour of their landlords, or in a careless confidence in a continuance of the existing state of things, have become lost to the tenants upon a change of the ownership of the land ; and in any of these cases if the tenants have received compensation, the compensation has been given for the honour of the landlord. Instances of such loss to the tenants have come within the experience of most conveyancers in large practice, but they are exceptional and not numerous. The case before us lies between the two extremes known to English experience, improvements being made without leases, but at the same time under circumstances justifying or inducing confidence in the continuance of the tenancy. The relations of the landlords and tenants of Ireland are further complicated by the fact that improvements are, to an increasing degree, made jointly ; and still further complicated throughout nearly all Ulster, and in many parts beyond Ulster, by dealings in which both landlord and tenant contemplate a continuing though undefined interest in the tenant. That these complications have left tenancy from year to year in the same position in which they found it, is a supposition at variance with the spirit of English law. But what exact relations have been

created, or are being created by these means between the parties, it is not easy to say positively, more especially as one formula will not embrace all the relations. The general result may, I think, be thus stated. Irish tenure without lease, must be considered to be a tenure from year to year, with different equities annexed—equities in some instances, capable of being enforced in a Court of Chancery, so as to limit either the power of eviction, or the power of raising rents, or both; or, at any rate, so as to ensure the tenant compensation on removal; and equities, in other instances, tending in the directions just mentioned, but only moral equities. The evidence in each instance must decide to which category the instance belongs.

Let us go step by step, beginning with the instances where the equities are the weakest. In a country where it is the practice for tenants to make the improvements, a landlord allowing a tenant to enter without a lease upon the land, and to make the improvements necessary for the enjoyment of the land, cannot be supposed to have held out an expectation, nor can the tenant be supposed to have entered with the expectation, that the landlord should re-enter immediately and appropriate the labour of the tenant. Some expectation the landlord has held out, and upon the faith of it the tenant has entered. What is it? The expectation differs in different cases. Like many other agreements not reduced to writing, but resting upon words and acts, the contract between the parties has been left vague, and

has now to be determined by law. We have no cases exactly parallel to guide us, because cases arise out of the facts of society, and the facts of English society differ radically from the facts of Irish society. We must look then at the nearest English cases, where tenants without leases have incurred expenditure under some expectation, and, after seeing how English law has dealt with them, consider how far the conclusions are modified by the difference between English society and Irish society. We shall find no better exposition of the law than that given by Lord Kingsdown in summing up the results of these cases :—

“If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory v. Mighell*, 18 Ves. 328, and, as I conceive, is open to no doubt.

“If, at the hearing of the cause, there appears to be such uncertainty as to the particular terms of the contract as might prevent a court of equity from giving relief if the contract had been in writing, but there had been no expenditure, a court of equity will nevertheless, on the case which is above stated, interfere in order to prevent fraud; though there has been a difference of opinion amongst great judges as to the nature of the relief to be granted. Lord Thurlow seems to have thought that the Court would ascertain the terms by reference to the Master, and if they could not be ascertained, would itself fix reasonable terms. Lord Alvanley and Lord Redesdale, and perhaps Lord Eldon, thought

this was going too far; but I do not understand any doubt to have been entertained by any of them that, either in the form of a specific interest in the land, or in the shape of compensation for the expenditure, a court of equity would give relief, and protect in the meantime the possession of the tenant.

"If, on the other hand, a tenant being in possession of land, and knowing the nature and extent of his interest, lays out money upon it in the hope or expectation of an extended term, or an allowance for expenditure, then if such hope or expenditure has not been created or encouraged by the landlord, the tenant has no claim which any court of law or equity can enforce. This was the principle of the decision in *Pilling v. Armitage*, 12 Ves. 78, and, like the decision in *Gregory v. Mighell*, seems founded on plain rules of reason and justice."*

If we arrange the cases of these Irish tenants under the three classes of this passage, very few will be placed in the first class, for that class is intended to comprise tenants who have entered without lease upon the promise of a specific interest, while the peculiarity of Irish tenancy without lease is that no definite interest is held out in expectation. More cases will belong to the third class, in which are placed tenants who, knowing the extent of their interest, have incurred expenditure upon hopes not created or encouraged by their landlords, and who have no claim in law or equity. Into this class came the case of *Dr. O'Fay*. But most Irish tenants will, I think, be found to belong to the second class, which comprises the cases of uncertainty as to the particular terms of the contract coupled with expenditure, with regard to which Lord Kingsdown, following the authority of the great

* *Dyson v. Ramsden*, L.R. 1. H. L. 129,

judges whom he mentioned, and to whom he must be added as second to none, says that there is no doubt that a Court of Equity will grant relief either, for this is the only point where these judges differ, in the form of a specific interest in the land or in the shape of compensation; and,—here all these judges agree,—in the meantime protect the possession of the tenant. We may pass by the first class without further notice. The real question is, Do these Irish tenancies belong in general to the second or the third of these classes? To answer the question, we must examine carefully the case to which Lord Kingsdown has referred as describing the third class, because it forced, as we have seen, the Irish Judges, to deliver a judgment, from the results of which they shrank, and because the transaction detailed in it resembles actual transactions in Ireland, excepting the difference of system as to improvements in England and Ireland.

The plaintiff, a tenant from year to year, filed a bill to obtain a lease of some premises from the defendant, on the ground of an agreement which he alleged to have been made in 1790, but which was denied by the defendant, that in consideration of his improving and building a mill on the premises he should not be disturbed during the lifetime of the defendant.

The plaintiff's expenditure was not disputed; but he failed to prove the alleged agreement based upon it. In giving judgment against him, Sir W. Grant, after pointing out this failure of proof, entered upon the wider question involved; and his remarks have

governed the matter ever since. This is my excuse for setting them out at some length. He said :—

“Can the plaintiffs then claim upon the general equity, having laid out a great deal of money in improving the mills, with the knowledge of the defendant, standing by seeing them go on, not objecting, or in any way interfering to prevent them? Whatever equity might arise upon that footing would be of a different sort from that which they could claim upon a specific engagement for a lease of a definite duration. As to that, if you disconnect the improvements from any specific engagement, upon the faith of which they were made, it is very difficult to give the plaintiff the benefit of this improvement to whatever degree they may have ameliorated the estate. I would go every possible length to aid parties in obtaining reimbursement of expenditure upon another's property, of the benefit of which they have been deprived by the exercise of his legal right, determining their lease from year to year. Whatever his own breast may suggest to him, the question here is, what legal and equitable redress can be obtained.

“I do not know any case in which a lessee, either of a term or from year to year, making any improvement upon the estate in his possession, though with the complete knowledge of the landlord, has been held as entitled against that landlord to have his lease prolonged until he shall obtain reimbursement for the improvements he has made; for he has a title, of which he knows the duration. He is not under a mistake with regard to the nature of his title. He may, perhaps, be guilty of great imprudence if the expectation, that his lease will be renewed, or his possession from year to year will continue, prove unfounded. But, because that expectation is disappointed, can I say he has acquired a right to a prolongation of his lease, or to a lease for a certain period? What is the information the landlord ought to be expected to give in such a case? What information can he give to a tenant from year to year other than he possesses; viz., that he is a tenant from year to year, making improvements, and

laying out money upon an estate in which he has no permanent interest.

"I am now supposing there was no promise by the defendant to quiet the plaintiffs in the possession for his life; upon such promise, if established, they must succeed; but, treating it merely as the case of improvements, made in his view, that information would not have conveyed to them anything they did not possess.

"This case is the case of a tenant from year to year, making improvement at his own discretion, upon the hope, arising from the habit of his landlord, that it would be worth his while to take the chance, having no apprehension of being disturbed. These parties, independent of any promise, rested so much upon the faith, that they should not be disturbed in the enjoyment, as their ancestors had not been for many years, that they thought themselves as safe as if they had a lease. But can I convert that hope into an actual engagement by the landlord, binding him down to permit them to continue in possession, not for a definite period, but until they shall be reimbursed. See how far that would extend. The case hardly occurs of a good tenant, especially where tenants are seldom turned out, who does not make some improvement. Can a Court of Equity say such a tenant is never to be removed, until it has been settled in equity how much has been laid out under the expectation that he should not be turned out, and the landlord would not exercise his legal right until reimbursement? This is a hard case upon the plaintiffs, if they lose all their money; but to give redress in a particular case likely to occur rarely, am I to lay down a principle, that would shake the security of property in almost all its ramifications and the dealings of men with each other? For that purpose, I must say, that the true measure of justice is that a landlord should never turn out a tenant, if improvements have been made with the knowledge of the landlord, until the tenant shall be completely reimbursed." *

To put it shortly. A tenant from year to year does not by the mere fact of making improvements, though with the knowledge of his landlord, acquire a right either for a prolongation of his holding or for compensation. Before we are in a position to clear up "the uncertainty as to the particular terms of the contract" between the two parties, we must have some evidence that there is a contract. Occupation coupled with improvements do not of themselves imply an agreement.

In arriving at these decisions the Judges of England have set out from a system in which landlords make improvements, and the improvement of tenants are exceptional. This is constantly to be observed in their arguments. On the occasion when Lord Kingsdown delivered the judgment already quoted, in a case where a tenant from year to year had built a house, and then claimed a lease upon an alleged tenant-right of the estate, Lord Cranworth and Lord Wensleydale spoke of the "folly" exhibited by tenants from year to year in building. Sir W. Grant, as we have seen, feared to "shake the security of property in almost all its ramifications," by attempting "to give redress in a particular case likely to occur rarely." If, when reading the words of these Judges, we call to mind the conduct of Dr. O'Fay, or of Mr. Clarke of Rathcore, we shall see that the Judges are reasoning from their experience of one set of facts, and the Irish tenants are acting from their experience of another set of facts. What is rare to Sir W. Grant appears to be the natural conduct to

these tenants. It is precisely this difference which makes the Irish Master of the Rolls speak of his being bound to administer "an artificial system." In England the system has followed from their roots the ramifications of property. In Ireland it comes upon ramifications issuing from another stem. In Ireland to apply the term "folly" to these tenants would be mere mockery. No Judge would use the word of a practice sanctioned by a standing of two hundred years, and adopted for the convenience of the landlord no less than for the convenience of the tenant. Hence in applying these decisions to Ireland, we must ask—How far are they modified by the difference between the English and Irish systems? English law would cease to be English law if so remarkable a difference in the circumstances did not produce any modification; but in the absence of any decision on the exact point, I can speak only with hesitation. This difference in the circumstances must, I think, produce at the very lowest, two legal results; first, less evidence must be necessary on the part of the tenant of the landlord's knowledge of the improvements, for his knowledge is a step though not enough alone, even if the difference does not shift the burden of proof, and raise a presumption of the landlord's knowledge of improvements suitable to the holding; and, secondly, as the system is intended for the benefit of the landlord as much as for the benefit of the tenant, less evidence than in England must be necessary to support a promise on the part of the landlord of a continued tenancy.

So far we have been dealing with the cases in which the equity is the weakest, and dealing with them in the only way possible in these pages, as a class. Let us advance a step, and take the class of cases daily, as the evidence shows, becoming more numerous and more distinct, in which improvements are made by the landlord and the tenant jointly, and place them beside the law, as explained by Sir W. Grant in another part of the case already quoted.

The defendant, in that case, while denying the agreement set up by the plaintiff, asserted that the real agreement was one entered into in 1794, according to which the defendant was to advance £300 out of £500, at which sum the necessary repairs and improvements had been estimated, to furnish wood at a reasonable price, and stone gratis, and the plaintiff was to pay interest at £5 per cent. The plaintiff, however, did not rely on this agreement.

Sir W. Grant said :—

“The only possible ground for redress is upon the footing of the agreement of 1794; but that is inconsistent with the shape of the Bill. If a landlord enters into an arrangement with a tenant relative to improvements, and so completely sanctions them, as himself to agree to advance part of the money, implying that another part is to be in advance by the tenant, I doubt whether that does not fasten an equity upon the landlord, precluding him, when these improvements are made under his authority, from saying there is an end to the lease. Such an arrangement, though without a specific arrangement would imply one; as it would be so contrary to good faith to encourage a tenant in so positive and direct a manner to proceed in particular improvements and then deny him all benefit, that I think equity would interfere; and hold

it an implied term, that the tenant should have the fair benefits from the improvements, thus made by the concurrence of his landlord."

Our next step leads us to Ulster Tenant-Right. Some landlords, we have seen, deal openly with tenant-right, while others shut their eyes to its existence; but accept its benefits. As a matter of law, there can be little doubt that the landlord who accepts the benefits with closed eyes is as fully affected with notice of the transaction as the landlord who deals openly. Let us recapitulate the leading features of the transaction. It is done with the knowledge, and sometimes at the office, of the agent; the landlord accepts the incoming tenant upon the suggestion, subject to different limitations in different estates, of the outgoing tenant; he allows the incoming tenant to pay money as a consideration for the tenancy under him, sometimes actually regulating the money paid; and when his rent is in arrear, he takes the first share of the money. Most landlords who act in this manner intend to make themselves parties to the transaction; but whatever they intend, where all or most of these acts are combined, they would be held in law parties. What, then, is the legal import of these acts? Without doubt the landlord holds out to the incoming tenant an expectation of an interest of some duration, but what the expectation is must depend on the particular circumstances of each case, and vary on each estate. To take an instance. Suppose an estate of which the tenants are given to understand that they

will not be evicted, except for the breach of some well-known rules of the estate, and that their rent will not be raised or even revised for twenty years from a given date;* and suppose a new tenant admitted to replace an old tenant under the tenant-right, five years after this given date; these circumstances would probably fasten an equity on the landlord, preventing him from evicting the tenant, except in the cases provided for, or raising his rent during the remaining fifteen years. Other instances may be suggested, where the tenant might not succeed in resisting eviction, but would probably be held entitled to compensation for the money he had been allowed to spend. Or, again, in other cases, where the tenant failed in preventing altogether an increase of rent, the money paid by him would probably be held a charge upon the land, and a Court of Equity would restrain such an increase of rent as would encroach on the value of the charge.

One step more. It is obvious that the equity in favour of the tenant becomes still stronger in cases where tenant-right and joint improvements meet.

The question will rise to the lips of every one, How comes it, if these equities exist, that the tenants have not availed themselves of them, and why need we any further remedies? The question admits of a distinct answer. These equities are enforceable only in the Court of Chancery, and the Court of Chancery is too far removed from the home of the small holder, and too expensive to help him. Whatever other legislation is

* See Minutes of Evidence. II. L. 1867. Q. 881, &c.

needed, our survey of the facts of Irish tenure must convince us that rights and remedies relating to land ought not to be left to equities, the full values of which have not been judicially determined, but should be defined by positive legislation, and administered by Courts on the spot. As it is, the jurisdiction of the Court on the spot, the Civil Bill Court, is too limited to afford full relief, although as long ago as 1816 this Court was invested with authority in the matter. The Act of that year, already mentioned as giving the Civil Bill Court concurrent jurisdiction with the Superior Courts in ejectment in the case of small tenements, by a clause designed to protect the tenant, entitled him to every defence he might have in law or equity.* This clause was repeated in the Landlord and Tenant Act of 1860, and is now in force.† But the operation of the clause has been much narrower than could at first sight be supposed from the words. The Act of 1816, in giving the Civil Bill Court merely a concurrent jurisdiction with the Superior Courts of law, left the plaintiff, when the tenant whom he sought to evict raised an equitable defence, liberty to remove the case from the Civil Bill Court, where the equitable defence was available, to the Superior Courts of law, where the equitable defence was not available. So completely was this the result that an Irish judge, in discussing whether an equitable defence before him should be admitted, said:—

* 56 Geo. III. c. 88, s. 9.

† S. 9.

“ There is always this to be considered when we are going to do a thing of that kind, that you put the unsuccessful party to bring his ejectment before another tribunal, where the legal title must prevail, as the Court of Law cannot regard the equitable case of the defendants.” Thus in practice, the jurisdiction of the Civil Bill Court was limited by the purely legal jurisdiction of the Superior Courts of Law. This result has been somewhat modified by the subsequent legislation, which has rendered equitable defences in ejectment admissible in the Superior Courts of Law; but substantially it remains as it was, and the test as to whether a tenant can successfully maintain an equitable defence in the Civil Bill Court is practically still, whether he can maintain the defence in the Superior Courts of Law. Now, the Superior Courts consider their jurisdiction limited by the nature of their machinery. This may be illustrated by a typical Irish case. In an action of ejectment, the defendant pleaded as an equitable defence an alleged agreement between himself and the plaintiff that in consideration of his paying the plaintiff a debt of £18 due from the outgoing tenant, and engaging to expend £150 upon the farm, the plaintiff promised not to disturb him so long as he paid his rent regularly, without repaying the £18 and the expenditure. The Court, however, set aside the plea. It disclosed, said Judge Crompton, a case for equity: but it was impossible to settle the action without an account; and the Court had no officer, no machinery and no authority to take such

an account.* The practical limitation thus imposed is obvious. The value of tenant-right based on improvements is essentially a matter of account,—account of growing intricacy, in proportion as improvements are made jointly,—and Courts without officers, machinery, and authority to take an account cannot administer justice. When we criticise the rough and ready valuation conventionally adopted for Ulster tenant-right, we must not forget that the law does not afford help in valuing the elements which admit of being reduced to certainty.†

We have thus reviewed the facts of Irish tenure; we have placed them by the side of the principles of English law, and the judicial decisions most nearly applicable; and these are our results. English law has been administered in Ireland without the element of Custom: and English equity is liable to become in Ireland a merely artificial system, if it neglects to take cognizance of the systematic difference in agricultural management between England and Ireland. But taking cognizance of that difference, we must be led, I think, to these conclusions—that a great number of the tenants of Ireland have actual rights which are ill secured; that there is between them and their landlords a complicated state of accounts which it is for the interest of both parties to have cleared up, and put on a footing so distinct as to pre-

* *Cochrane v. Commack*, 7 Ir. C. L. R. 10.

† I owe the facts of this paragraph to the kindness of Dr. Hancock.

vent similar complications hereafter ; that the present tenancy from year to year lodges in the hands of landlords too much power ; and that the present state of the law and the machinery by which the law is administered do not suit the conditions of Irish society. These conclusions present a basis for legislation ; but before sketching any legislation, it will be well to examine what other considerations the facts reviewed suggest.

In the first place, the great variety of the facts in itself shews the impossibility of applying one common remedy, either by establishing fixity of tenure or by granting one universal lease, whether for a term of sixty-three or twenty-one years. On what principle are we to make the same grant to tenants, of whom there are many, who are not improving their holdings even if they are not deteriorating them, and the tenants, who are steadily reclaiming the inhospitable moorlands of Donegal, or to come nearer home, are creeping up the hill sides almost within sight of Dublin. On what principle are we to mete out the same measure to the landlord who does everything and to the landlord who spends nothing on his estate, and how can such a remedy meet the cases of improvements jointly made by landlords and tenants ? Lastly, with what justice can we do this thing to proprietors who have purchased within the last twenty-five years property to the value of thirty millions under a Parliamentary title ?

In the next place, it seems impossible to deny that

the long leases from which so much was expected in the last century, and which were advocated by Dobbs and by Burke, proved a failure. The experiment was fairly tried in very many of the leases made after 1777. The original lessees under these leases were not middlemen, but real cultivators who by the subsequent rise of prices were induced to sublet to other cultivators, and these again to others in a descending series. This is shewn in the history of several estates traced by the Devon Commission.* The truth is, that when the original lessor and lessee turned their backs upon one another for sixty years, the time of their meeting again was so distant that neither had any very strong personal interest in what would be the state of things at that epoch. Judging from the past, the best protection for the tenant, best, that is, looking to the advancement of agriculture and the general welfare of the community, is not to be sought in long agricultural leases, but in providing him with complete security for compensation for his outlay, whatever the length of his lease, and whenever the termination of his tenancy; and in leaving the length of the tenancy to be settled by the requirements of the agriculture of the district.*

Again the facts before us shew the risk, it might not be too much to say, the certainty, that every law, good or bad, wise or unwise, affecting the framework

* *e. g.* The Caher Estate; and Lord Palmerston's Estate.

† I have seen two forms of leases in actual use in Ireland, drawn on this principle.

of society, will produce effects different from the effects anticipated.

“Sith every action that hath gone before,
Whereof we have record, trial did draw
Bias and thwart, not answering the aim,
And that unbodied figure of the thought,
That gave ’t surmised shape.”

There is nothing which more impresses the student of legal history, than the collateral and unexpected results of almost every law, results increasing in importance with the importance of the law, and sometimes overtopping its direct effects; and there is no page of legal history more full of striking illustrations than the history of Irish legislation. The tenure of leaseholds for lives renewable for ever was introduced by men of wisdom after deliberation, as the best remedy for the evils pressing in their day, but it ended in producing great uncertainty of tenure. The long leases consequent upon the Act of 1777, promoted the subsequent subdivision of land; the Act of 1793, conferring the franchise on Roman Catholics, an Act of undoubted justice, operated in the same direction, and the Act establishing the Landed Estates Court, notwithstanding the advantages attending it, has, in many instances, worked hardly for tenants. Looking back, we are able to say how each of these laws was drawn athwart, but the lawgivers looking forward, failed to foresee the causes which have diverted each law,

“Tortive and errant from its course of growth.”

From these failures we may gain experience. The

tenure of leaseholds renewable for ever failed, mainly because the tenant-landlords imitated the fashion set by their superior absentee landlords, and lived upon the revenue of their estates without superintending them. The operation of the Acts of 1777 and of 1793 was affected by the long war; and at the time of the establishment of the Landed Estates Court, the legislature did not properly appreciate the conditions of Irish society and the nature of tenants' property. The neglect of their duty by a class, and war, are disturbing forces which a lawgiver could not foresee; but the warning conveyed by the past, that disturbing forces which we cannot now foresee will certainly appear in the future, bids us observe all the more carefully what is within the range of our horizon, the actual conditions of the society for which we are legislating. And a careful observation of the past and present conditions of Irish tenure cannot fail, I think, to make every one shrink from summary and startling legislation, and prefer, as regards the past, to give security to every right which has established itself; and, as regards the future, to enable every Court having jurisdiction in the matter, by the aid of ampler powers and more perfect machinery than heretofore, to protect every form of property which may grow up under an equity or a custom.

Turning now from the past to the present, let us observe the conditions of Irish tenure, which may guide or assist us in legislation.

The two most suggestive conditions of Irish tenure, at this moment, appear to me to be Ulster Tenant-

Right, and the increase of the system of joint improvements by landlords and tenants. These two conditions have in common that they have not been produced by any law, but have grown up of themselves. The latter, in bringing the landlord and tenant into friendly co-operation, has some analogy to the process by which English agricultural customs have grown up, and as it raises an equity in favour of the tenant, it affords him protection which will become more complete in proportion as the jurisdiction of the Courts is enlarged. One of the dangers of attempting to force upon Ireland a term of lease by statute, is the great risk we run of making the statute the measure of the relation between the parties. In compelling a landlord by law to grant a specific lease, we exonerate him from all moral responsibility to do anything but obey the law; we disincline him to contract relations of his own with his tenants; we deprive the country of the advantage which it has already derived from the effect of the public opinion of England upon the landlords of Ireland, to which, in no small degree, must be attributed the expenditure already noticed as now incurred by them; and we are in danger of stifling a practice which the most competent witnesses represent as beneficial, and as gaining ground in Ireland. We can ill afford to squander any of the forces for good, or waste any of the elements promising advance which we possess. Our course is to uphold the practice, at the same time making it clear that the co-operation of the landlord

and the tenant creates a legal relationship, under which each has a share which may be accurately determined.

The other and by far the most suggestive condition of Irish tenure, Ulster Tenant-Right, is not only of natural growth, but is the consequence, as Lord Dufferin has said, of the good relations subsisting between the tenants and the landlords in the North of Ireland; and it has existed long enough in turn to strengthen those relations throughout all Ulster.

Whether as effect or cause—probably as an effect first, and afterwards as a cause—it is the system of the part of Ireland where agriculture is at its best. The people of the North, as already mentioned, set great store by it. “It has wound itself,” says Mr. Trench, “into the feelings of the people, who consider it just and fair.” It is a property valued at twenty millions; and those among the Irish of the North who are joining in the agitation respecting the land question are joining in it from the fear that Ulster tenant-right is in danger, and in defence of the property invested. Lastly, it is the object of desire in other parts of Ireland. Ulster tenant-right has this remarkable peculiarity, that it sprang up among the immigrant race, and has been extended to the Celtic race, and been welcomed by them. It is the only acceptable present made by the one race to the other. It is the one institution which the tenants of both races unite

in upholding. Its origin may be in Londonderry, but it is as highly valued in Donegal as in Londonderry, and it is desired in Tipperary and Cork. Ulster tenant-right, therefore, comes before us with claims on our attention difficult to overrate. What, then, is the essence of the system in the eyes of the tenants? They value it because it affords them protection, and it affords them protection by creating for them a charge upon the land. It does not give fixity of tenure in words, because, however unpopular might be the exercise of the right, the landlord is admitted, under the system, to have the right of removing a tenant upon payment of the tenant-right. But it tends to fixity of tenure, because it makes eviction expensive. And it further offers some guarantee against an undue increase of rent. The critics of the system, especially the English critics, appear to me to have attended to the accidents, not to the essential part of the system, and to have fixed their eyes too exclusively on the amount of the charge as diminishing the capital of the tenant, and its origin as conceding a right of occupation. To the tenant the important point is that the charge in his favour exists. The present tenants have either inherited or bought up the charge, and are indifferent as to its origin.

No more instructive illustration of the difference between the points of view of the tenants and their critics can be selected than the following extract from the evidence of Mr. Russell, the agent for the property of the Marquis of Conyngham in Donegal, given to the Committee of the House of Lords:—

"Do you consider that under Ulster tenant-right a tenant is placed in advantageous circumstances for improving his property? —They go on improving under that tenant-right; they consider that the purchasing of that tenant-right gives them, in fact, an interest in the land as good as the proprietors.

"It gives them fixity of tenure? —It gives them fixity of tenure.

"About what is the rate that is paid for tenant-right; I suppose there is something like a regularity in the tariff, is not there, of the purchase-money that is paid? —It depends very much upon the locality. Upon the large proprietors' estates a very much larger sum is given than on small proprietors' estates for the tenant-right. On Lord Conyngham's estate, which I manage, it varies from 10 to 20 years' rent.

"That is, from 10 to 20 years' purchase? —Yes.

"Then a man pays nearly the fee simple of the land, in order to have the privilege of paying the proper rent to his landlord? Yes.

"That is the reason I asked you whether, where tenant-right prevails, a tenant was under circumstances that would enable him to improve the land, and do justice to himself and his landlord, and you say you think he is? —It very often happens that to make up these sums they are obliged to go into debt; they borrow from whom they can at a high rate of interest.

"Then the tenant enters upon this business which is every day becoming one requiring more and more science and skill and application of capital, with his millstone round his neck? —Yes.

"Surely he cannot be in a position to do justice to himself and his landlords? —Such is the system.

"We want to know whether in your judgment it is a good system? —If it could be got over it would be very desirable, but I do not see how it can; it has been going on for so many years that a man thinks when he pays so much for the right to hold his landlord's property that he has a right not to be dispossessed of it without the privilege of selling it to another.

"It is a property charged with a rent to be paid every year;

the consequence is the tenant must be perpetually in difficulties. I do not see how a man is to live who pays the fee simple of the property (for it comes very nearly to that), and has to pay what his landlord expects and considers to be a proper rent for it afterwards?—Unless he has the money accumulated, he is in difficulties all his life; but in many cases by frugality and industry, he in a few years is enabled to pay off the sum borrowed.

“Has it not struck the people that that cannot be a good system which secures a man’s being in difficulty all his life.—The tenants in Ulster do not appear to think so; they think it gives them a security, and so anxious are they to possess land that they gladly avail themselves of it.”*

It is admitted on all hands that large sums are paid for the tenant-right. I cannot, however, help suspecting that the statements of the evil resulting from these payments—statements coming from one side—are exaggerated. The small holders, who cultivate with the spade and lime, do not in the present state of their agriculture care to spend money upon their holdings, and the money paid by them for tenant-right is withdrawn from their deposits at the bank, or from their hoards in the thatch, or some old stocking: and as to the larger tenants, some weight should be allowed to their own explanation as given to me by a substantial farmer in Down. “It is not money,” he said, “which they would spend on their farms. It is money saved up in other ways to buy a home.” We have to bring these payments into harmony with the fact of Ulster being the best cultivated part of Ireland. The problem is one in which the calculation upon the elements

* Minutes of Evidence. H. L. 1869. Q. 831.

furnished by political economy must be corrected by the introduction of moral elements, in order to bring out a result accounting for all the facts. The amount paid may lessen the tenant's capital, and in so far be a force acting against agriculture. But the sense of security purchased is a force on the other side, and the resultant of the two forces is in favour of agriculture. After reading the evidence of Mr. Russell—corroborated as he is by others—no one can doubt that the power of purchasing this tenant-right is an incentive to frugality, and that its possession gives the tenant a security which he values, and under which he makes improvements. He may pay highly, but he has secured the protection, the want of which writers and statesmen, and generations of the people, have felt to be the flaw of Irish tenure.

This security has been obtained not by means of leases, but by the creation of a charge upon the land. To this I ask attention. We cannot feel surprised that almost every one who has approached the subject and looked at Ulster tenant-right has asked, whether it would not be possible to extend Ulster tenant-right over the rest of Ireland. To extend Ulster tenant-right pure and simple is impossible, because in Ulster a conventional mode of valuing the tenant's interest has been agreed upon; and in the rest of Ireland, with a few exceptions perhaps, this is not so. But the principle of securing a tenant by means of a charge is applicable wherever a charge can be created. And this charge can be created by the valuation of his

equity arising out of the permanent improvements he may have made, alone or jointly with his landlord. The value ascertained becomes his tenant-right charge at the date of valuation.

But in going through the tenantry of Ireland, we shall find many who have not improved their holdings, or have improved them under circumstances which do not raise an equity in their favour; tenants, for example, whose rent has been lowered in consideration of future reclamation, and who have consequently received their compensation. It would upset the first principles of contract to treat these tenants as having acquired tenants' property or equitable rights. Accordingly every Tenant-Right Bill has, in some form, recognized that a tenant is not entitled to compensation for improvements made in pursuance of a contract or in consideration of any reduction of rent allowed at the commencement or any other period of his occupation. And where no compensation can be recovered no tenant-right charge can be created. We must protect these tenants by other means, and protection may, I think, be afforded them by converting a tenancy without lease from a yearly tenancy into a tenancy for a course of husbandry according to the custom of the country. In this change we make the law follow facts, and we carry out the principle by which tenancy at will was formerly converted into tenancy from year to year. Where the liberty of cultivation conceded by law to a yearly tenant is abridged by an obligation to cultivate with reference to a course of husbandry, he is fairly

entitled as a correlative right to a tenancy of the duration of the course.*

I suggest the extension of tenant-right on a real basis in preference to compulsory leases, not doubting that the introduction of leases is the goal to be aimed at, but doubting the wisdom of forcing leases on the country. There are two obvious means of forcing leases: one by making void all agreements not in writing, and the other by enacting that in the absence of a written agreement a lease of an extended term shall be presumed. Both means have been proposed for Ireland; but neither would really benefit the tenant. The first lessens his security; and the second, by putting the landlord and the law in antagonism, tempts the landlord to curtail the excessive protection of the law by an express and harsher contract. It is safer to try to arrive at leases through tenant-right. Tenants with charges recognized by law will be in a better position, and more likely than at present to enter into written agreements. Besides, it is difficult to say whether the great mass of the tenants of Ireland desire leases. The only method of reconciling the conflicting statements is by supposing that the more intelligent and richer tenants desire them, but that many are indifferent, if not averse to them. In Ulster, too, there is some fear of the effect of a lease upon tenant-right.

This fear raises a point which must not be left un-

* This change has been suggested also by Mr. Caird. "The Irish Land Question." 1869. P. 17.

settled. It has generally been proposed that a new lease—a lease, at any rate, of some duration—should be taken as satisfaction for any prior claims of the tenant. I venture to suggest that it is better not to enact any presumption on the subject. If a tenant on entering into a lease holds a tenant-right charge, and he and his landlord agree that he shall give up the charge in exchange for a long term or lighter rent, their agreement can easily be expressed. But there seems no reason for enacting a presumption that the tenant intends to sell his charge unless he says so. In the long run it would probably be better for the landlord that the tenant should retain the charge, for it would be a fund guaranteeing the landlord against loss at the end of the lease. The landlord would be in a position analogous to the present position of the landlords of Ulster, to whom, according to Mr. Trench, Ulster tenant-right as a money matter is a gain.

We have based the tenant-right charge on a valuation. The question whether it would be better to value and register tenant-right charges at once, or to recognize the legal right now, and leave the actual amount to be valued when occasion arises, as well as the choice of the best machinery for valuation, are questions which require a knowledge of Irish Policy and of the comparative fitness for the purpose of different branches of Irish Administration, which it would be presumptuous in me to affect, and questions, besides, lying beyond the scope of these pages. One or two general principles of valuation alone call for notice. Where tenant-right

exists with the cognizance of the landlord, either avowed or to be implied in law, the amount paid with the cognizance of the landlord is the measure of the tenant's interest estimated as a charge. Where this measure does not exist, those entrusted with the task of valuation must proceed to estimate the value of the improvements of the tenants. Nor would the task be so difficult as might at first sight appear. The conviction has become widely established that tenants have a moral claim to compensation for permanent improvements, and in many estates some value must have been set upon the claim. In the expenditure spoken of by Mr. Trench on the estates with which he is concerned, we saw an entry headed "Compensation for surrender of tenements." The agents possess elements of calculation which it would be for the interest of the landlord to bring forward. Without being too sanguine, we might expect that on some estates the agent and the tenants would settle by agreement tables of valued interests; and when the valuation has thus been passed through the two sieves of tenant-right and of agreement, the remaining cases of disputed facts would be reduced to a number small in comparison with the importance of the investigation.

Again. Is the valuation to be made on the basis of the value of the improvements as they stand, or on the basis of the value of the unexhausted improvements? The tenants answer, The value of the improvements as they stand. Most landlords, I believe, in accord with the agricultural practice of England, answer differently.

Lord Dufferin shows that he feels the difficulty, for he divides improvements into those which affix something to the soil, separable in idea at least, as a house; and those which may be called manipulations of the soil. To the latter he applies the notion of exhaustion. According to this view drainage and ploughing differ merely in the difference of their furrows. The furrow of the ploughman is remunerated by the crop of the next season, while the furrow of the ditcher needs more seasons for remuneration. But Lord Dufferin told the Committee of the House of Commons that he allowed his tenants the actual value of a house after an enjoyment of even sixty years; on the ground that its value, if it is kept in repair, is nearly as great then as on its first erection, and that it is not a self-compensating improvement.* It appears to me that the notion of exhausted and unexhausted improvements is not applicable as the basis of calculation in valuing the past improvements of Ireland, even if it be desirable to introduce the notion for the future by express contract. The notion of a tenant investing in improvements with a view of recouping himself, is taken from a state of society in which the tenant has a market of investments open to him and agriculture has become commercial. The notion therefore may be supposed to form part of the common intention with which in this stage of society the landlord and the tenant contract. But this cannot

* Minutes of Evidence. H. C., 1805. Q. 991. Q. 1007. This is the principle, not the exact words of the answers.

be asserted absolutely of Ireland in the past. Taking, for instance, the barony mentioned by Mr. Trench as converted by the tenants from an alder plain into a cultivated district, who would assert that the landlord, who left the tenants to make this reclamation, and the tenants "driven to extremities to support themselves," contemplated investments to be satisfied by being replaced as the common intention of both? Who would even assert that the idea occurred to either of them? The tenants have supplied in this and other similar instances their own labour and the labour of their families in order to gain a living and to make a home. We are in danger of borrowing a notion from one stage of society and applying it to another. Length of enjoyment may enter into the calculation by way of deduction, as may enjoyment at a low rent and other limitations; but they are deductions not to be absolutely presumed, but to be established as matters of bargain by evidence.

The question has been much discussed, whether the express consent of the landlord should be necessary to found a claim for compensation for improvements. It is a question which decreases in importance in proportion as the system of joint improvements advances. It is important chiefly to the small holder, who reclaims at odd hours and by superfluous labour, and who has difficulty in furnishing a precise notice of his labour. The agricultural customs of England, in which the consent of the landlord is implied to some operations of obvious advantage, suggest that a

similar consent should be implied in Ireland, within certain limits which might easily be defined.

One word more. The creation of a tenant-right charge will limit an unfair increase of rent; for it opens the door for the law to enter and restrain an increase of rent overlapping, so to speak, the tenant-right charge; and the law, in allowing an increase of rent, would measure, not by the momentary demand, but by the average rise in the value of land. Thus would be securely welded the weak joint in the harness of Ulster tenant-right. And at this point arbitration might well intervene upon a definite legal basis, and without vagueness and the substitution of the management of the State for the management of the proprietors, in order to protect the tenant-right charge, and to fix the rent consistently with it, before the question of increase assumes a litigious shape, and comes within the jurisdiction of the ordinary Courts. And if the Boards entrusted with this arbitration had jurisdiction also to hear questions which the landlords and tenants agreed to refer to them, they might expand into useful Courts of Conciliation. Probably, among the earliest questions referred to them would be the determination in particular cases of what length of lease ought to be considered an equivalent for past or future improvements of the tenant under the circumstances of the case. As in the matter of valuation, so here also it would be unbecoming in me to express an opinion as to the department to which such Boards ought to be attached; it is enough to say that the Boards must be capable of

doing right on the spot cheaply, and must be impressed openly and deeply with the stamp, not of tribunals of litigation, but of tribunals of peace.

To sum up shortly. The equitable rights which, according to the arguments in these pages, many of the tenants of Ireland possess, offer a basis for legislation. It becomes our object to protect these rights. Two methods of protection present themselves, protection by way of leases and protection by way of tenant-right. Tenant-right, as worked out by the people themselves, has, though unrecognized by law, already afforded partial protection to these rights. By the legislation now suggested, that tenant-right would be recognized in law, and by careful valuation converted into a well-defined system capable of being extended and of being adopted with or without leases. Leases would be made easy, but not compulsory. For the protection of all tenants, tenancy without lease would be presumed to be tenancy for the customary course of husbandry. To meet the great difficulty, that customs of the country do not grow spontaneously in Ireland as in England, the Courts would have jurisdiction sufficient to protect every future equity. And in the hope of removing causes of dissension between landlords and tenants, Boards of Arbitration would be at hand to value and deal with tenant-right, and to adjust the rents due to landlords in accordance with it.

Such are the conclusions to which we are led, and such is the help towards dealing with the past and

legislating for the future afforded us by placing the facts of Irish tenure by the side of the principles or decisions of English law, and to this, perhaps tedious and narrow but, not unimportant, investigation, these pages have been confined.

Still our survey would be incomplete if we left unnoticed the proposal, grounded avowedly on the history we have reviewed, for facilitating the acquisition of the fee-simple by small holders. The proposal does not supersede our investigations, for it does not effect a settlement of the past or present relations of landlords and tenants, but seeks to get rid of the difficulties by enabling Irish society, if so minded, to assume a new form. I suppose no one doubts that there are many tenants who have the means of purchasing, and desire to purchase their holdings, if the purchase could be made by instalments; and that there are many landlords willing to sell if they were not prevented by family settlements. This alone is a strong argument for rendering purchase easy, and striking off every fetter which impedes the freedom of sale. But this is not all. The physical peculiarity of the country, the absence of coal, has made competition in many manufactures difficult if not impossible for the Irish, and has led them to look to the land. The history we have reviewed culminates in these facts. Of the five hundred and ninety-seven thousand holders of land in Ireland in 1866, very nearly two-thirds held between five acres and fifty; more than half held between

five acres and thirty; and far more than a quarter held between five acres and fifteen.* Mapped out before us lies a country of small holdings. The discussion, as far as Ireland is concerned, whether large farms or small farms are most productive, is as unpractical as a schoolboy's theme, comparing the governments of Athens and of Sparta. For us the question is, Under what tenure should small farms be held in Ireland so as to produce most prosperity and happiness? No one can venture to say that small leaseholds are necessarily more conducive to prosperity than small freeholds, especially when there are elements of alienation between the landlords and the tenants of the leaseholds. It must be a matter of experiment to be tried by the people. Our experiments upon tenure have not proved successful; it is worth while helping them to try their own. Failures they will make, many and bitter; but the failures will teach them lessons and inflict natural penalties upon the lazy, the feeble, and the embarrassed; and landlords will be spared from being regarded as ministers of eviction and forced emigration. Land-jobbers will spring up; though the protection of tenants' property will put some limit on their illegitimate profits. This is the dark side. There is a bright side. Legislation with this object cannot fail to obliterate the traditions of past conquest. Legislation with this object will be in accordance with, and bring into play, the love of country, the most enduring and one of the noblest of Irish ideas.

* Thom's Almanack, 1869, p. 854.

When we have protected property acquired in the past, and enabled the people to acquire new property in the future, we may hope that at the end the vision will come and not tarry, which King James the First and his legislators wrote on the tables of their law, but saw not, and every generation since has waited for and none has seen; and that the uniting of the Kingdoms of England, Scotland and Ireland under one Imperial Crown will bring to Ireland the happiness which it has brought to England and to Scotland.

2, HARCOURT BUILDINGS, TEMPLE.

January, 1870.



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